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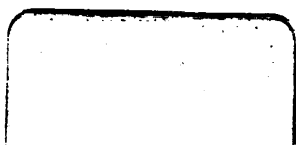
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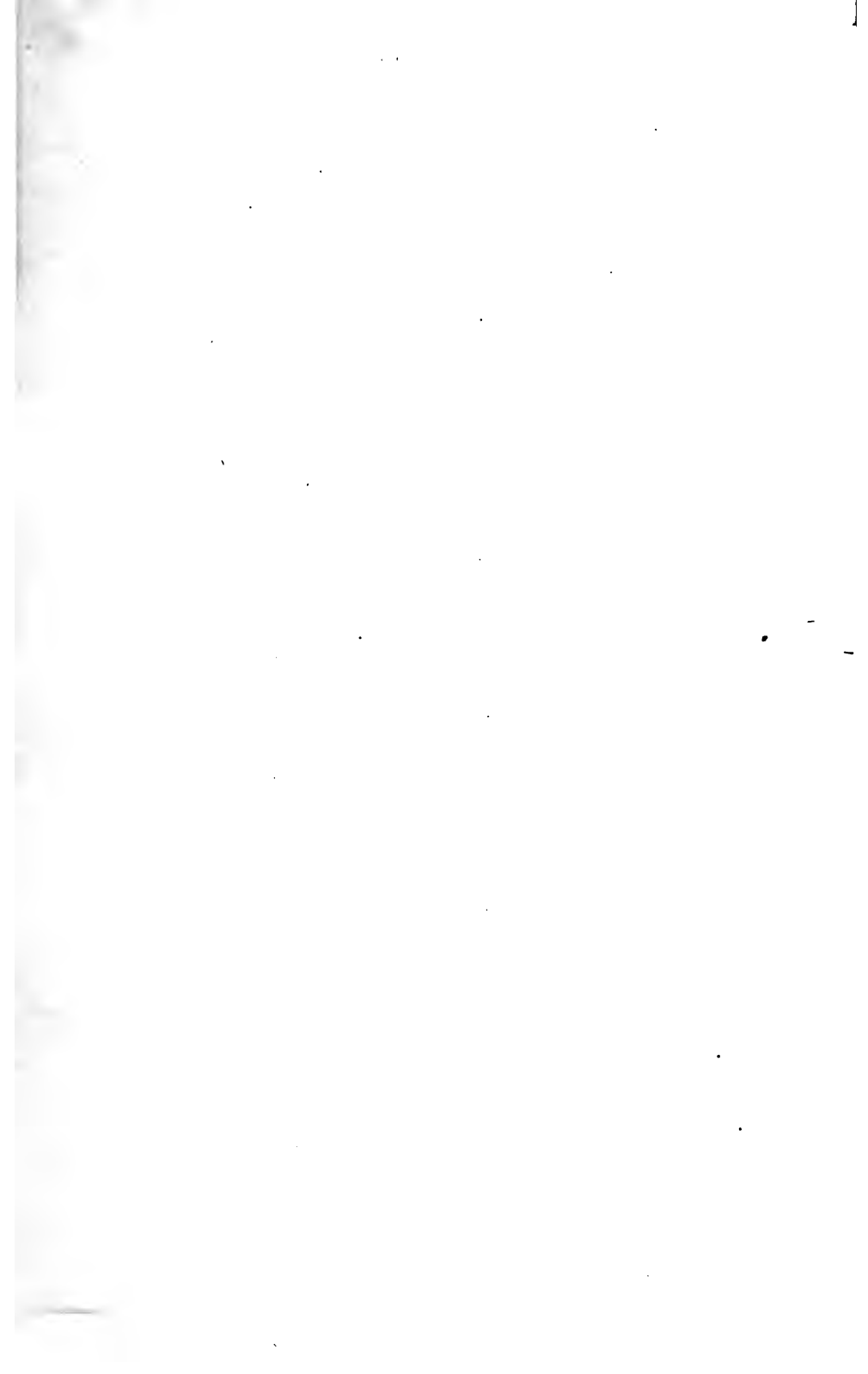
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D. Y. Baggett

PACIFIC COAST
LAW JOURNAL,

CONTAINING ALL THE

Decisions of the Supreme Court of California,

AND THE IMPORTANT DECISIONS OF THE

*U. S. CIRCUIT AND U. S. DISTRICT COURTS FOR THE DISTRICT
OF CALIFORNIA, AND OF THE U. S. SUPREME COURT
AND HIGHER COURTS OF OTHER STATES.*

W. T. BAGGETT, EDITOR.

VOLUME THREE.

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Pacific Coast Law Journal.

VOL. 3.

MARCH 1, 1879.

No. 1.

Current Topics.

WE begin this volume of the JOURNAL under the most favorable circumstances. The combined support accorded us by the almost entire bar of the State, justifies us in continuing our JOURNAL with the hope of enlarging and extending it throughout the entire West. We feel thankful to our subscribers and promise them a fulfillment of every obligation such a general support entails upon us. We will continue to publish all the written opinions of our Supreme Court immediately after their rendition, and all the unwritten opinions will be carefully prepared and furnished in supplements every two or three weeks. We will thus increase our work many pages without additional cost to subscribers.

WE have a case in hand (an unwritten opinion of our Supreme Court), touching the proper construction of the sections of the Code respecting fictitious names and designations under which copartnerships transact business. A construction of this statute has been long desired, and we regret that what we shall place before our subscribers will be unsatisfactory, because it does not construe the statute except in a restricted and limited case. But this much can be claimed that where the designation or name of a firm shows the surname of all its members, though "& Co." is affixed and is meant to represent no one, and said firm assigns its claim against a debtor, the assignee may maintain an action notwithstanding the firm filed no certificate as required by the statute. The statute has been held unconstitutional by two of our District Judges, but this point was not raised in the case alluded to. The case will be published soon.

THE changes made in the Judicial Department of the proposed Constitution since our publication in full of the article are material. In some instances entirely new sections have been added and old ones stricken out, and certain sections made applicable to other counties than those previously mentioned. We have therefore considered it best, inasmuch as the profession will have to refer often to the article, to set it out again in full as passed on the final vote. The contributed article on the subject in our issue of February 1st., showed forcibly the seriously objectionable features of the section respecting the formation and workings of the Supreme Court under the new system, and we confidently believe that the section would have been eliminated, had the same opposition that manifested itself on the final passage of the measure been waged at an earlier day. The entire article, however, has had the full support of many of the most talented members of the bar in the Convention; still a question will always remain as to whether or not the Chief Justice, under the new system, has not been given too much arbitrary power. We regret that the Convention saw fit to enact section twenty-four. The remedy therein stated might, with some little degree of propriety, be made applicable to the Superior Courts from which an appeal may be taken, should the cause be thus prematurely decided, but as to the Supreme Court, which is the highest court under the system, and from which there is no appeal, the section should not apply. There seems to be really no virtue in the provision. It is intended as a spur to action, and therefore presupposes a dereliction of duty. If strictly enforced, it would compel a too hasty dispatch of the business of the court. As a remedy for an abuse of the privilege given the courts to exercise their discretion as to the amount of thought and study they should give a case, it adds nothing to existing statutes. There is nothing in the new section to hinder the Supreme Court from ordering further argument, or awarding judgment and immediately granting a rehearing. The Superior Courts can escape the spur of this section by giving judgment and granting a new trial. There is no practical value in this

measure of reform. Other sections will be noticed as time and space will permit.

ARTICLE VI.

JUDICIAL DEPARTMENT.

SECTION 1. The judicial power of the State shall be vested in the Senate sitting as a Court of Impeachment, in a Supreme Court, Superior Courts, Justices of the Peace, and such inferior Courts as the Legislature may establish in any incorporated city or town, or city and county.

SEC. 2. The Supreme Court shall consist of a Chief Justice and six Associate Justices. The court may sit in departments or in bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The Chief Justice shall assign three of the Associate Justices to each department, and such assignment may be changed by him from time to time. The Associate Justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves or as ordered by the Chief Justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in bank. The presence of three Justices shall be necessary to transact any business in either of the departments, except such as may be done at Chambers, and the concurrence of three Justices shall be necessary to pronounce a judgment. The Chief Justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two Associate Justices, and if so made it shall have the effect to vacate and set aside the judgment. Any

four Justices may, either before or after judgment by a department, order a case to be heard in bank. If the order be not made within the time above limited the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the Chief Justice, in writing, with the concurrence of two Associate Justices. The Chief Justice may convene the court in bank at any time, and shall be the presiding Justice of the court when so convened. The concurrence of four Justices present at the argument shall be necessary to pronounce a judgment in bank; but if four Justices, so present, do not concur in a judgment, then all the Justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four Judges shall be necessary. In the determination of causes, all decisions of the court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The Chief Justice may sit in either department, and shall preside when so sitting; but the Justices assigned to each department shall select one of their number as presiding Justice. In case of absence of the Chief Justice from the place at which the court is held, or his inability to act, the Associate Justices shall select one of their own number to perform the duties and exercise the powers of the Chief Justice during such absence or inability to act.

SEC. 3. The Chief Justice and the Associate Justices shall be elected by the qualified electors of the State at large, at the general State elections at the times and places that State officers are elected; and the term of office shall be twelve years, from and after the first Monday of January next succeeding their election; *provided*, that the six Associate Justices elected at the first election shall, at their first meeting, so classify themselves, by lot, that two of them shall go out of office at the end of four years, two of them at the end of eight years, and two of them at the end of twelve years, and an entry of such classification shall be made in the minutes of the court in bank, signed by them, and a duplicate thereof shall be filed in the office of the Secretary of State. If a

vacancy occur in the office of a Justice, the Governor shall appoint a person to hold the office until the election and qualification of a Justice to fill the vacancy, which election shall take place at the next succeeding general election, and the Justice so elected shall hold the office for the remainder of the unexpired term. The first election of the Justices shall be at the first general election after the adoption and ratification of this Constitution.

SEC. 4. The Supreme Court shall have appellate jurisdiction in all cases in equity, except such as arise in Justices' Courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, and in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings of insolvency and actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also, in all criminal cases prosecuted by indictment, or information in a court of record on questions of law alone. The court shall also have power to issue writs of mandamus, certiorari, prohibition, habeas corpus; and, also, all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the Supreme Court, or before any Superior Court in the State, or before the Judge thereof.

SEC. 5. The Superior Court shall have original jurisdiction in all cases of equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars, and in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; also in actions of forcible entry and detainer, of proceedings

in insolvency, of actions to prevent or abate a nuisance; also, of all matters of probate, and, also, of divorce and for annulment of marriage, and all such special cases and proceedings as are not otherwise provided for. And said court shall have the power of naturalization, and to issue papers therefor. They shall have appellate jurisdiction in such cases arising in Justices' and other inferior courts in their respective counties as may be prescribed by law. Said courts shall be always open (legal holidays and non-judicial days excepted), and their process shall extend to all parts of the State; *provided*, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens, upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated. Said courts, and their Judges, shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus, on petition by or on behalf of any person in actual custody, in their respective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days.

SEC. 6. There shall be in each of the organized counties, or cities and counties of the State, a Superior Court, for each of which at least one Judge shall be elected by the qualified electors of the county, or city and county, at the general State election; *provided*, that until otherwise ordered by the Legislature, only one Judge shall be elected for the counties of Yuba and Sutter; *and, provided*, that in the city and county of San Francisco there shall be elected twelve Judges of the Superior Court, any one or more of whom may hold court. There may be as many sessions of said court, at the same time, as there are Judges thereof. The said Judges shall choose from their own number a presiding Judge, who may be removed at their pleasure. He shall distribute the business of the court among the Judges thereof, and prescribe the order of business. The judgments, orders, and proceedings of any session of the Superior Court, held by any one or more of the Judges of said courts, respectively, shall be equally effectual as if all the Judges of said respect-

ive courts presided at such session. In each of the counties of Sacramento, San Joaquin, Los Angeles, Sonoma, Santa Clara, and Alameda, there shall be elected two such Judges. The term of office of Judges of the Superior Courts shall be six years, from and after the first Monday of January next succeeding their election; *provided*, that the twelve Judges of the Superior Court, elected in the city and county of San Francisco at the first election held under this Constitution, shall, at their first meeting, so qualify themselves, by lot, that four of them shall go out of office at the end of two years, and four of them shall go out of office at the end of four years, and four of them shall go out of office at the end of six years; and an entry of such classification shall be made in the minutes of the court, signed by them, and a duplicate thereof filed in the office of the Secretary of State. The first election of Judges of the Superior Courts shall take place at the first general election held after the adoption and ratification of this Constitution. If a vacancy occur in the office of Judge of the Superior Court, the Governor shall appoint a person to hold the office until the election and qualification of a Judge to fill the vacancy, which election shall take place at the next succeeding general election, and the Judge so elected shall hold office for the remainder of the unexpired term.

SEC. 7. In any county, or city and county, other than the city and county of San Francisco, in which there shall be more than one Judge of the Superior Court, the Judges of such court may hold as many sessions of said court at the same time as there are Judges thereof, and shall apportion the business among themselves as equally as may be.

SEC. 8. A Judge of any Superior Court may hold a Superior Court in any county, at the request of any Judge of the Superior Court thereof, and upon the request of the Governor it shall be his duty so to do. But a cause in a Superior Court may be tried by a Judge *pro tempore*, who must be a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record, approved by the court, and sworn to try the cause.

SEC. 9. Members of the Legislature shall have no power to grant leave of absence to any judicial officer ; any such officer who shall absent himself from the State for more than sixty consecutive days shall be deemed to have forfeited his office. The Legislature of the State may at any time, two-thirds of the Senate and two-thirds of the members of the Assembly voting therefor, increase or diminish the number of Judges of the Superior Court in any county, or city and county, in the State ; *provided*, that no such reduction shall affect any Judge who has been elected.

SEC. 10. Justices of the Supreme Court, and Judges of the Superior Courts, may be removed by concurrent resolution of both Houses of the Legislature, adopted by a two-thirds vote of each House. All other judicial officers, except Justices of the Peace, may be removed by the Senate on the recommendation of the Governor, but no removal shall be made by virtue of this section, unless the cause thereof be entered on the journal, or unless the party complained of has been served with a copy of the complaint against him, and shall have an opportunity of being heard in his defense. On the question of removal, the ayes and noes shall be entered on the journal.

SEC. 11. The Legislature shall determine the number of Justices of the Peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of Justices of the Peace ; *provided*, such powers shall not in any case trench upon the jurisdiction of the several courts of record, except that said Justices shall have concurrent jurisdiction with the Superior Courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars, and in cases to enforce and foreclose liens on personal property when neither the amount of liens nor the value of the property amounts to three hundred dollars.

SEC. 12. The Supreme Court, the Superior Courts, and such other courts as the Legislature shall prescribe, shall be courts of record.

SEC. 13. The Legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of Section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the Judges thereof.

SEC. 14. The Legislature shall provide for the election of a Clerk of the Supreme Court, County Clerks, District Attorneys, Sheriffs, and other necessary officers, and shall fix by law their duties and compensation, which compensation shall not be increased nor diminished during the term for which they shall have been elected. County Clerks shall be *ex officio* Clerks of the courts of record in and for their respective counties, or cities and counties. The Legislature may also provide for the appointment, by the several Superior Courts, of one or more Commissioners in their respective counties, or cities and counties, with authority to perform Chamber business of the Judges of the Superior Courts, to take depositions, and perform such other business connected with the administration of justice as may be prescribed by law.

SEC. 15. No judicial officer, except Justices of the Peace and Court Commissioners, shall receive to his own use any fees or perquisites of office.

SEC. 16. The Legislature shall provide for the speedy publication of such opinions of the Supreme Court as it may deem expedient, and all opinions shall be free for publication by any person.

SEC. 17. The Justices of the Supreme Court and Judges of the Superior Court shall severally, at stated times during their continuance in office, receive for their services a compensation, which shall not be increased or diminished after their election, nor during the term for which they shall have been elected. The salaries of the Justices of the Supreme Court shall be paid by the State. One-half of the salary of each Superior Court Judge shall be paid by the State; the other half thereof shall be paid by the county for which he is elected. During the term of the first Judges elected under this Constitution, the annual salaries of the Justices of the Supreme Court shall be six thousand dollars each. Until

otherwise changed by the Legislature, the Superior Court Judges shall receive an annual salary of three thousand dollars each, payable monthly, except the Judges of the city and county of San Francisco, and the counties of Alameda, San Joaquin, Los Angeles, Santa Clara, Sacramento, Yuba, and Sutter, Nevada, Butte, and Sonoma, which shall receive four thousand dollars each.

SEC. 18. The Justices of the Supreme Court and Judges of the Superior Courts shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected.

SEC. 19. Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

SEC. 20. The style of all process shall be, "The People of the State of California," and all prosecutions shall be conducted in their name and by their authority.

SEC. 21. The Justices shall appoint a Reporter of the decisions of the Supreme Court, who shall hold his office and be removable at their pleasure. He shall receive an annual salary not to exceed twenty-five hundred dollars, payable monthly.

SEC. 22. No Judge of a court of record shall practice law in any court of this State during his continuance in office.

SEC. 23. No one shall be eligible to the office of Justice of the Supreme Court, or to the office of Justice of a Superior Court, unless he shall have been admitted to practice before the Supreme Court of the State.

SEC. 24. No Judge of a Superior Court nor of the Supreme Court shall, after the first day of July, one thousand eight hundred and eighty, be allowed to draw or receive any monthly salary unless they shall severally take and subscribe an affidavit before an officer entitled to administer oaths, that no cause in his court remains undecided that has been submitted for decision for the period of ninety days.

Supreme Court of California.

JANUARY TERM.

[No. 5,334.]

[Filed February 28, 1879.]

JUDSON ET AL., RESPONDENTS,

VS.

PORTER ET AL., APPELLANTS.

An action to correct a defective certificate of a Notary Public of the acknowledgment by a married woman of her execution of an instrument purporting to be a conveyance of her separate real property, can not be maintained under Sections 1202 and 1203 of the Civil Code, when the defective certificate was made prior to the enactment of that Code.

Appeal from the Nineteenth District Court, city and county of San Francisco.

The action was brought to reform a Notary Public's certificate of acknowledgment by a married woman, annexed to the deed, through which the plaintiffs claimed, dated June 27, 1853, and to enjoin the prosecution of other suits brought by defendants involving the title to the same property, pending this suit. The complaint alleges that Mrs. Foley sold the property, received the consideration, signed the deed, and was examined and made the acknowledgment in the form required by law to pass the estate of a married woman, but that the Notary Public neglected to set forth these facts in his certificate. The answer denied all the material allegations of the complaint, and set up also the Statute of Limitations. The court below found the facts from the testimony of the Notary, he being the only witness, substantially as alleged in the complaint, and gave judgment for the plaintiff, allowing the certificate to be corrected and amended in conformity to the facts as found. Defendants' appealed.

B. S. Brooks, for appellants.

The court has no jurisdiction. After taking the acknowledgment and making and delivering his return, the Notary's

functions cease, and he can not alter or amend his certificate. (11 Cal. 281; 1 Peters, 341.) Nor can the court authorize the officer to amend his certificate. (1 Peters, 328.)

The only evidence there can be of a married woman's consent to a deed is the certificate. The defect can not be helped by parol. (13 Barb. 55; 37 Conn. 527; 3 Conn. 406; 11 Conn. 129; 1 Binn. 470; 4 S. & R. 271; 6 S. & R. 48; 9 S. & R. 270; 3 Or. 353; 17 Ohio St. 39.) It can not be falsified by the officer. (35 Miss. 83; 11 Ind. 398.)

A court of chancery can not compel her to correct an insufficient acknowledgment. (9 Cal. 13; 7 Cal. 266; 12 Allen, 476.) Chancery has no power to correct the certificate. (39 Vt. 544; 18 Md. 305; 4 Iowa, 381.)

The judgment rendered is of no avail. The law as it stood when this deed was executed, required a *certificate* to pass title. The court could grant no relief. The deed itself is *inoperative*. There is no deed unless it is certified. (32 Cal. 266; 40 Cal. 547.)

The Code does not confer authority upon District Courts to amend such acknowledgments. The statute has no retroactive effect. (C. C. P. Sec. 3; Sedg. on Cons. and Stat. Con. 194; 7 John. 477.)

W. H. Patterson and Winans & Belknap, for defendants.

The acknowledgment was a question of fact about which there was no conflict of testimony. The Notary Public who took the acknowledgment, being the only witness, the court will not disturb the finding or judgment. (29 Cal. 494-5.) The legislation (C. C. 1,202, 1,204) permitting a certificate of acknowledgment to be attached and recorded is valid. (30 Cal. 138; 33 Cal. 45, etc.)

McKINSTRY, J., delivered the opinion of the court.

Sections 1202 and 1203 of the Civil Code are as follows: "1202. When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the District Court to obtain a judgment correcting the certificate." "1203.

Any person interested under an instrument entitled to be proved for record may institute an action in the District Court against the proper parties to obtain a judgment proving such instrument."

The question here presented is whether, under these sections, an action can be maintained to correct the notarial certificate of the acknowledgment by a married woman, of the execution of an instrument purporting to convey her separate real property—made *prior* to the adoption of the Civil Code.

At the date the defective certificate was made, Section 19 of the Act of April 16, 1850, "Concerning Conveyances," declared the law: "A married woman may convey any of her real estate by any conveyance thereof, executed and acknowledged by herself and her husband, and *certified* in the manner hereinafter provided, by the proper officer taking the acknowledgment."

It was always held here that statutes like this were to be considered as relaxing the rule in respect to the incapacity of married women, and that the wife, therefore, could dispose of or incumber her real estate only to the extent and in the mode authorized by such statutes.

By the language of the 19th section above cited, she could convey only by means of the signature, acknowledgment, and *certificate*. Neither the writing, nor the acknowledgment, nor both passed the title. The deed was not fully *executed* until the proper certificate was attached.

Section 1205 of the Civil Code (which is found in the same chapter with 1202 and 1203,) provides: "The legality of the execution, acknowledgment, proof, form, or record of any conveyance or other instrument made before this Code goes into effect, executed, acknowledged, proved, or recorded, is not affected by anything contained in this chapter, but depends for its validity and legality upon the laws in force when the act was performed."

By its terms this section provides that the legality of the *execution* of an instrument made before the Code shall not be *affected* by anything contained in Sections 1202 and 1203, but

must depend upon the laws in force when the act was performed. It is impossible to construe this section but as declaring that no part of the chapter should be held *proprio vigore* to validate an execution invalid when it was attempted ; and Section 1205 (which refers to the whole chapter) can have no application to Sections 1202 and 1203, unless its effect is to prohibit any proceeding under those sections to make good a defective execution of an instrument, attempted prior to the Code. The expressions, "The legality is not affected" and "The legality depends upon the laws then in force," are very broad when applied to the execution of an instrument. It could hardly be said that nothing in the chapter affected the execution of an instrument, if by virtue of the provisions contained in the chapter, a proceeding could be taken to render perfect an execution previously defective and therefore of none effect. In such case the legality of the execution would be affected by something in the chapter the moment proceedings to affect its validity were commenced under sections of the chapter.

The conclusion is that an action to correct a defective certificate of a Notary Public of the acknowledgment by a married woman of her execution of an instrument purporting to be a conveyance of her separate real property, can not be maintained under Sections 1202 and 1203 of the Civil Code, when the defective certificate was made prior to the enactment of that Code.

Judgment and order reversed.

We concur :

CROCKETT, J.

NILES, J.

RHODES, J.

(WALLACE, C. J., being disqualified, did not sit in this cause.)

UNWRITTEN OPINIONS.

No. 6,086—*Hardy vs. McPherson*—January Term, 1879.—Action for restitution of premises and damages. Judgment for plaintiff. Affirmed for want of appearance on part of appellant.

No. 6,310—*People vs. Chase et al.*—January Term, 1879.—This is an action brought to foreclose the interest the defendant has in a certain certificate of purchase of State lands for delinquencies, under the provisions of Title 8, Chap. 1, Art. 6, Political Code.

Upon default of defendant Chase, the court below entered a decree that all the interest of the defendant in said certificate, and all right, title, and interest in the lands therein described, be foreclosed and canceled. Defendant Chase had assigned all his interest in said lands to defendant Clark, who appeals.

S. W. Geis and Terry & McKinne, for appellant.

The complaint is defective, and will not support the decree. The complaint must allege a performance of all preliminary matters. (36 Cal. 639.)

Everything essential to a right of action must be pleaded, or the complaint is insufficient, and will not sustain a judgment. (6 Cal. 46; 10 Cal. 558; 14 Cal. 211; 14 Cal. 457; 15 Cal. 410; 28 Cal. 547; 43 Cal. 521.)

The complaint shows that the publication of the list, and notice prescribed by Political Code, Sec. 3747, was not made for four weeks.

The action should be to foreclose the interest of the purchaser in the *land*. This action is brought to foreclose the interest in the certificate of purchase. (P. C. 3547.) The certificate of purchase had been assigned to Clark. (P. C. 3515.)

The summons must state the cause and general nature of the action. (C. C. P. 407.) If not, it is defective, and will not sustain judgment by default. (8 Cal. 625; 44 Cal. 633; *People vs. Green*.)

The decree granted further relief than demanded. The complaint asked for foreclosure of interest in certificate of purchase, and the decree foreclosed all interest in the lands. (C. C. P. 580; 11 Cal. 19; 20 Cal. 91; 27 Cal. 102; 29 Cal. 165; 34 Cal. 79; 28 Cal. 289.)

If judgment is void on its face, the remedy is by motion in the court rendering the judgment. (37 Cal. 528; 14 Cal. 157; 16 Cal. 200.) And may be after adjournment of term. (*Biburd vs. Krouts*, — Cal. 110; 5 Cal. 297; 3 Cal. 137.) Not too late. (46 Cal. 341.) As to the remedy by motion. (3 Cal. 180; 37 Cal. 323; 16 Cal. 560; 21 Cal. 88; 43 Cal. 341.)

P. B. King and S. Solon Hall, for respondent.

Clark, the appellant, has no interest in the subject-matter of the appeal. Chase assigned the certificates to Paige, and Paige sold all right, title, and interest in the land to Clark. This conveyed no right that Paige might afterward acquire by a patent. (18 Cal. 465; 30 Cal. 344; 33 Cal. 288.)

The decree was entered December 30, 1876, and the motion to set aside was made March 19, 1878. It was too late. (C. C. P. 473; 19 Cal. 706; 25 Cal. 51; 28 Cal. 336.)

Order affirmed.

No. 6,278—*George Uhl, appellant, vs. Rachel Uhl, respondent*—November Term.—The action was brought for a dissolution of marriage, on the grounds of desertion by wife (respondent); that the community property be equally divided, and that the homestead property be assigned to husband (appellant) for such period, etc.

The findings showed that the parties were married in 1860, and lived together until 1874—no children; that there is community property; that during cohabitation, parties acquired considerable real and personal property, all of which is in possession of defendant, and her separate property; that defendant is owner of a lot, and in May, 1870, she filed a declaration of homestead to it, in the name of Rachel Uhl; that on February 5, 1874, defendant deserted

plaintiff; that defendant was married to Joseph Mazeaux in 1848, in due form, and not dissolved until August 5, 1867, when decree was entered in the District Court, Placer County; that after entry of decree, plaintiff and defendant continued to cohabit; that on December 15, 1860, and for two years previous, defendant believed Mazeaux was dead.

Judgment in favor of defendant; that the marriage between plaintiff and defendant on December 15, 1860, was and is null in law, and is hereby declared null and void.

Plaintiff appeals principally on the ground that, after the divorce from Mazeaux, he and defendant agreed to and did live together openly as man and wife (corroborated by evidence), and this constituted a valid marriage, especially as it was followed by their cohabitation as such, and was kept up and continued for eight or nine years.

John Heard, attorney for appellant.

Armstrong & Carey, of counsel, cited Greenleaf's Ev., Sec. 27; 1 Penn. L. J. Rep. 479; 17 Cal. 598.

L. S. Taylor and Curtis & Clunie, attorneys for respondent.

Cohabitation does not ripen into marriage. (10 Cal. 533; 26 Cal. 129.)

United States Land Department.

METTE vs. STATE OF CALIFORNIA.

The construction given Sections 6 and 7, Act of March 3, 1853, by the United States Supreme Court, is that where settlement and improvement are found to exist on a school section at the time of survey, and properly proven, the right of the State to the land is gone, and she is entitled to select other land in lieu thereof, but where the settler, being under no obligation to assert his claim, abandons it, the title of the State at once becomes absolute, as of the date of the survey, and the land is not left to be operated upon by other Acts of Congress.

By the abandonment referred to is meant the settler's failure to assert his claim within the legal period, by filing the usual notice thereof, or by failure to make proof and payment thereafter within the time prescribed by the statute.

All such claims must be asserted under the pre-emption law, and not under the homestead law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

WASHINGTON, D. C., October 18, 1878.

REGISTER AND RECEIVER—

Sacramento, Cal.:

GENTLEMEN: I have considered the application of Henry Mette, to enter, under the provisions of the homestead laws, the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 16, Tp. 10 N., R. 8 E., M. D. M., transmitted with your letter of the 18th of June last, on appeal from your decision refusing to receive the same for the reason that the tract applied for is part of a school section, granted to the State as such, and also because you have reason to believe that the State has sold the land to other parties as school land.

Mr. Mette's application bears date January 2, 1878, but his affidavit shows that he had settled upon the land over twenty-one years prior to such date; that in May, 1856, he purchased the right of possession of the premises in question, with the improvements thereon, consisting of a dwelling house and out-houses; that he resided in the dwelling house until the summer of 1876, continuously, when he erected and moved into a new dwelling house on land adjoining, where he still resides; that his improvements on the land in question consist of a stone wine cellar, a barn, out-house, a vineyard covering about eight acres, about the same number of acres in wheat, and a still-house, altogether of the value of about fifteen hundred dollars; that the land in question has been continuously resided upon, and in part cultivated since 1856, by different parties, and was so resided upon and cultivated at the date of the official survey hereafter named.

The survey made by the United States, and above referred to, was approved in 1866, and as the affidavit states, a certified copy of the same was at the time filed in the office of the Surveyor-General of the State of California, which showed, as it is elsewhere alleged, by proper and sufficient marks, that the land in question was settled upon at said date.

Both parties claim under the Act of Congress approved March 3, 1852 (10 Stat., 246).

The particular sections of this Act which the parties respectively construe for themselves, as entitling them to patents, are those numbered six and seven.

Section 6 provides, "That all the public lands in California except sections sixteen and thirty-six * * * shall be subject to the pre-emption laws * * * *Provided*, That where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale including such lands." * * *

Section 7 provides, "That where any settlement by the erection of a dwelling house or the cultivation of any portion of the land shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, * * * other lands shall be selected by the proper authorities of the State in lieu thereof. * * *

The proper construction of these two sections having been before the Supreme Court of the United States, it is decided that where settlement and improvement are found to exist on a school section at the time of the survey, upon these facts being shown in the proper mode to the officer of the United States, the right of the State to the land is gone, and in lieu of it she has acquired the right to select other land. (*Sherman vs. Buick*, 93 U. S. R., 209.)

In a later case it is decided that where the settler, being under no obligation to assert his claim, abandons it, the title of the State at once becomes absolute, as of the date of the survey, and that the land is not left to be operated upon by other Acts of Congress. (*Water and Mining Co. vs. Bugbey* 96 U. S. R., 165.)

The question then recurs, what constitutes an abandonment of a settler's claim under the Act of 1853? It seems to us that there is an abandonment where there is a failure to make up payment as provided in said Section 6, as one

of the provisions or conditions upon which the right of pre-emption is granted. It is our opinion that the pre-emptive right and protection to the settler, is by the act made to depend upon his giving such notice, and making payment within the time limited by the statute.

The settler though in possession is not obliged to assert any claim, and until notice is given, there is no way of knowing that he intends to assert it, nor how extensive his claim may be. A reasonable time is allowed him after survey to give notice, make proof of his right, and pay for the land.

He is not at liberty to continue in possession an indefinite number of years without notice, proof, or payment, and thus leave it for years uncertain whether the school section is to vest in the State, and what portion of it is to go to a settler.

In this case, some ten years or more elapsed without any claim being asserted or notice thereof given, and no land in lieu thereof has been claimed by the State. If ten years be allowable, or any period beyond that given by statute, there is no limitation whatever. Such is neither the letter nor the meaning of the provisions of the statute.

Upon the failure to give notice, make proof and pay for the land occupied by Mette within the period allowed by law, the land at once vested in the State of California as of the date of the approval of the survey.

This, in our opinion, settles the question of right, and we need only refer to the fact that by former decisions of this office, even if the right of claim exists, it can only be asserted under the pre-emption laws, and not under the provisions of the homestead law.

Your decision refusing to receive said application is therefore affirmed.

You will advise the parties in interest of this decision, and that sixty days will be allowed within which an appeal may be taken to the appellate authority; at the expiration of which time you will report promptly what action, if any, has been taken.

J. A. WILLIAMSON, Commissioner.

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Current Topics.

IN *U. S. vs. Thompson et al.*, the Supreme Court of the United States have very recently held that the Statutes of Limitations of a State do not apply to the United States; nor is it within the constitutional power of a State to make such a statute applicable to the United States.

JUDGE MORRISON, of the Fourth District Court, has granted a peremptory writ of mandate compelling the trustees of the Hastings Law School to admit Mrs. Clara S. Foltz, who had been previously refused admission. We are informed that an appeal has been taken from said order. We know nothing concerning the legal merits of the claim of said trustees to a right to exclude women from the college; but admitting the absolute right we fail to see the just propriety or a laudable object in thus denying a privilege so eagerly and earnestly sought after, and one which is of no more value to the owner by being withheld.

IN *U. S. vs. Clafflin et al.*, decided by the Supreme Court of the United States at the October Term, 1878, it was held:

(1.) A recital in a statute that a former statute had been repealed or superseded by subsequent acts, is not conclusive that such a repeal or supersedure had been made. Whether a statute was repealed by a later one is a judicial not a legislative question.

(2.) When a new statute covers the whole subject-matter of an old one, adds offenses, varying the procedure, the latter operates by way of substitution, and not cumulatively. The former is, therefore, impliedly repealed. It is, however,

necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of any repealing clause. If they are not, both statutes will stand, though they refer to the same subject.

MANY of the District and County Judges of our State have been called upon to construe the provisions of our insolvent laws, since they have become operative by the repeal of the Bankrupt Act. Among the most important questions that have arisen is, whether partnerships, as such, are entitled to the benefit of the act. We have been favored with a brief, ably arguing and reviewing the authorities, by Messrs. Sullivan & Cole, in the case of *O'Sullivan vs. Springer et al.*, on motion to vacate stay of proceedings granted by the Fourth District Court. The facts as stated by the brief are these: The plaintiff brought his action against the defendants, who were partners, in the Fourth District Court. Subsequently (October 31, 1878), each of the defendants filed a separate petition in insolvency. Certified copies of the petitions and orders of the County Court staying proceedings were filed in the Fourth District Court, and a stay of proceedings was also granted by that court. Upon the argument to vacate said order, plaintiff's counsel contend that the debts due are partnership debts; that partners can not take the benefit of the Insolvent Law; that the petition of members of said firm can not affect the rights of partnership creditors to partnership assets; and that the property of said firm is first liable to partnership debts.

The order staying proceedings was vacated by Judge Morrison, and Judge Daingerfield of the Twelfth District Court has recently made a similar ruling.

MRS. BELLA A. LOCKWOOD, is the first woman who has made application and been admitted to practice before the Supreme Court of the United States, under the recent act of Congress granting that right.

Supreme Court of California.

JANUARY TERM.

[No. 6,099.]

[Filed March 6, 1879.]

PEOPLE, APPELLANT, vs. LATHAM, RESPONDENT.

When an action was brought for less than ten dollars, tax, under the Act of March 28, 1874, "Levying a tax for State purposes for the twenty-fourth and twenty-fifth fiscal years, and to provide for the enforcement thereof," and final judgment was entered therein prior to the Act of March 16, 1876, "To regulate proceedings for the collection of taxes, and to prevent oppressive costs," the defendant is not entitled to have the judgment satisfied or the action dismissed on payment into court of the amount sued for, *without costs*.

Appeal from the Sixth Judicial District, County of Sacramento.

The facts appear in the opinion.

P. Dunlap, for appellant.

Geo. Cadwalader, for respondent.

McKINSTRY, J., delivered the opinion of the court.

In November, 1874, plaintiffs brought an action under the Act of March 28, 1874, "Levying a tax for State purposes for the twenty-fourth and twenty-fifth fiscal years, and to provide for the enforcement thereof." The action was against defendant for the sum of \$5 75-100, taxes due for the twenty-fifth fiscal year upon certain real estate. After due proceedings had, a decree was entered by the court below for the sale of the property, to satisfy said sum of \$5 75-100 with twenty-five per cent. added thereto, and interest and costs of suit. Copy of the decree, as an order of sale, was issued to the Sheriff, and was by him returned wholly unsatisfied. On the 7th of February, 1876, the court caused a judgment to be docketed against defendant for the amounts due under said decree, and ordered execution to satisfy the same out of the general property of the defendant.

The defendant, on the 14th day of May, 1878, paid the tax,

percentage and interest due on the judgment, but did not pay the costs of the action. This appeal is from the order of the District Court, denying plaintiffs' motion for an execution against the property of the defendant for the costs.

If the provisions of the Act of March 28, 1874, were applicable there can be no doubt the plaintiffs were entitled to recover costs. We are to inquire, therefore, whether under the Act of March 15, 1876, "To regulate proceedings for the collection of taxes, and to prevent oppressive costs," the defendant was entitled to have the action "dismissed" on payment of the amount sued for, without costs.

The final judgment in the court below was entered and docketed before the passage of the last named act.

It may be assumed that the Legislature, for the State, had power to remit the costs, leaving the attorneys for the People to appeal to the State for their compensation for services performed.

The question here relates to the construction of the language employed in the statute of March 15, 1876. The full text of that statute is as follows :

"SECTION 1. In all cases when actions have been brought in the name of the State to recover taxes, under the provisions of an act entitled 'An Act levying State taxes for the twenty-fourth and twenty-fifth fiscal years, and, to provide for the enforcement thereof,' approved March 28, 1874, and the amount of tax *sued for* is \$10 or less, the defendant or defendants, in each of said actions respectively, shall be permitted to settle the same on the payment of the amount sued for, without costs; and upon the payment into court of the said amounts, the defendant or defendants shall be entitled to have the action dismissed. No charge or cost of any kind shall be required of such defendant or defendants, by the Clerk or any other person, either before or after such payment into court, any law to the contrary notwithstanding.

"SEC. 2. This act shall take effect immediately."

In looking at this statute, we consider : 1. The class of cases to which it applies. 2. The privilege conferred on defendants. 3. The act to be performed by defendants. 4.

The right acquired by defendants on performance of such act. And, first, the statute applies to "all cases when actions *have been brought*" under the former statute and "the amount sued for is ten dollars or less;" second, the privilege is to "settle," etc.; third, the act to be done is the payment of the amount sued for, without cost; fourth, the right is to have the action *dismissed*.

The words, "when actions *have been brought*," and, "the amount sued for *is*," indicate a reference to actions *pending*. The word "settle" naturally refers to cases in which the asserted claim has not yet been definitely and finally determined by judgment; and the word "dismissed" is made applicable by the Code of Civil Procedure to dismissals on motion of defendant, only where the plaintiff fails to appear at the trial, or abandons the action, or fails to prove a sufficient case to go to the jury. (Sec. 581.)

Suits were disposed of by dismissal originally in chancery, and the term has been used in courts of law only at a comparatively late period. (Bouvier's Law Dict.) As used in *courts of law* it seems always to have been applied to a removal out of court prior to a judgment on the merits. After the final adjudication by the court having jurisdiction, the judgment (except when appealed from) can only be *satisfied* by the defendant. Certainly no case can be found in law or equity, in which an action has been *dismissed* on motion of *defendant* after judgment or decree, in favor of the *plaintiff*.

It is undoubtedly true that the Legislature might have given a broader meaning to the word "dismissed" than that which it had previously received as part of the legal phraseology. But, as we have seen, the context here not only does not require that we shall confer a new meaning upon the word "dismiss," but very strongly tends to strengthen the presumption arising from the use of the word itself, that it was not intended to apply to a case in which judgment had already been entered. If, however, there still remains doubt as to whether it was intended that a defendant who had contested an action throughout, could, after judgment and by virtue of a statute subsequently passed, have the action "dis-

missed" on payment of a portion of the judgment, a reference to the *title* of the Act of March 15, 1876, will remove such doubt. The title is, "An Act to regulate proceedings for the collection of taxes, and to prevent oppressive costs." The title surely indicates that the act was to be applicable only to proceedings pending when the act was passed, or such as should be commenced subsequent to the passage of the act. Order reversed.

We concur:

CROCKETT, J.

RHODES, J.

NILES, J.

WALLACE, C. J.

[No. 10,379.]

[Filed March 4, 1879.]

PEOPLE vs. SPRAGUE.

In a criminal case, the District Judge may refuse to consider or settle a bill of exceptions, presented by defendant, unless the notice required by Section 1171 of the Penal Code has been given to the District Attorney.

Appeal from First Judicial District, County of Ventura.

The defendant, Sprague, was indicted and found guilty of murder and appealed. The court refused to settle and certify the bill of exceptions presented by the defendant. The transcript on appeal contains more than one thousand manuscript pages. The opinion states all the necessary facts.

L. C. Granger, W. F. Williams, Frank Ganahl, B. F. Williams, Jas. G. Howard, and N. Blackstock, for plaintiff.

Creed Haymond, James D. Fay, Hines & Brooks, N. C. Bledsoe, W. W. Allen, for defendant.

McKINSTRY, J., delivered the opinion of the court.

The District Judge was fully justified in refusing to settle and certify the *bills of exceptions*, (so-called,) filed on the 16th and 18th of September. The first was a mere *skeleton*, containing no statement of evidence or rulings; the second was in the form pronounced "reprehensible" in *People vs. Getty*

(49 Cal. 584). Another circumstance made it the duty of the Judge to refuse to consider the bills proposed by the defendant. No notice was given to the District Attorney of defendant's intention to present either of the two drafts, as required by Section 1171 of the Penal Code. That section as amended is as follows: "Where a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days, to the District Attorney, to the Judge for settlement, within ten days after the trial of the cause, unless further time is granted by the Judge, or by a Justice of the Supreme Court, or within that period the draft must be delivered to the Clerk of the Court for the Judge. When received by the Clerk, he must deliver it to the Judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the Judge and filed with the Clerk of the Court."

A clause of the section provides that the delivery of the draft bill of exceptions to the *Clerk* shall be the equivalent of a presentation of it to the Judge personally; but defendant can not relieve himself of the necessity of serving notice on the District Attorney by handing the draft to the Clerk. The evident purpose of the section is that the District Attorney shall, in every case, have an opportunity to suggest amendments.

After the time for presenting or filing a bill of exceptions had expired, defendant's counsel moved the District Judge to set aside his order striking out and refusing to consider or settle the two bills formerly proposed, or, as an alternative, for leave to file a bill "to conform to the views of the Judge." This motion was made without any notice to the District Attorney, and without presenting any bill supposed "to conform to the views of the Judge" or otherwise.

In *People vs. Lee* (14 Cal. 510), it was said: "We held in *People vs. Woppner* (14 Cal. 437), that the statute directing the statement or bill of exceptions to be settled within ten days and signed by the Judge, in a criminal case, was directory merely, observing that it would be giving great

rigor to the rule, to hold the prisoner absolutely concluded of his rights by the failure of a Judge to settle or sign a statement within a limited time. * * * A variety of circumstances—even when the utmost diligence has been exercised—may prevent the settlement and signature. The destruction by fire or other accident, of the records, the sickness or death of counsel or Judge, may intervene. To hold that the rights of the prisoner would be absolutely lost, under circumstances of this nature, would be to sink the evident spirit and intent of the statute into an observance of its mere letter. But though the statute is only directory upon the Judge, it is not on that account to be the less observed by him. It was intended to prevent delays and to require the preparation and settlement, while the evidence and rulings of the Court are fresh in the recollection of the Judge and counsel. For that purpose the defendant must prepare his bill and tender it within the time designated, or such additional time as may be granted by the District Judge or a Judge of the Supreme Court, or give good and sufficient excuse for his failure to do so. *When such excuse is shown, the Judge should settle and sign the bill, otherwise not.* When the record is before us we will not inquire into the reasons which may have induced his action in signing the same after the statutory period, but will presume they were sufficient. The power exists with the Judge independent of the statute—the latter only prescribes a general limitation within which his power should be exercised, unless good excuse—having in view the object of the statutory provision—be exhibited. The statute is in this respect not unlike a rule of Court to be enforced to advance the ends of justice, and not to prevent their attainment."

We are satisfied with the views expressed in the foregoing citation. If, on notice to the District Attorney, a bill of exceptions had been presented to the District Judge (or delivered to the clerk) after the expiration of the time limited by the statute, and the District Judge *has settled it*, we would have assumed here that the defendant had shown reasons for the delay satisfactory to the Judge. So, perhaps, had he re-

fused to settle the bill presented or filed, we would on appeal have reviewed his action by an examination of the affidavits used at the hearing of the application. But, as we have seen in the present case, no bill of exceptions has been presented or filed with the clerk since the expiration of the time within which defendant—without excuse for delay shown—was authorized to present or file a bill. There is no provision in the Criminal Practice Act for an application for leave to “prepare a bill.” If, for sufficient reasons, counsel has not been able to prepare a bill of exceptions within the statutory time, one should be prepared as soon as may be afterwards, and be presented or filed (after notice to the District Attorney), accompanied by affidavits accounting for and intended to excuse the delay.

When it is intended to apply for the settlement of the bill of exceptions, after the expiration of the statutory period, the two days’ notice should be given to the District Attorney. First—Because Section 1171 of the Penal Code requires such notice whenever a bill of exceptions shall be presented or filed; and, second, because that officer should have an opportunity not only to propose amendments to the draft bill, but also to contradict the statements in the affidavits on which the application is based, or otherwise to prove that unnecessary delay has occurred. Orders affirmed.

We concur :

RHODES, J.

NILES, J.

WALLACE, C. J.

[No. 10,408.]

[Filed March 4, 1879.]

EX PARTE DUNCAN, ON HABEAS CORPUS.

1. Before the Supreme Court is authorized to reduce the amount of bail demanded of a prisoner by the court before whom he is to be tried, it must be *per se* unreasonably great and clearly disproportionate to the offense involved.
2. Bail demanded in the sum of \$112,000 is not disproportionate when the prisoner is indicted for ten distinct felonies.—[EDITOR LAW JOURNAL.]

The petition of Dora G. Duncan, wife of Joseph C. Duncan, represents that Joseph C. Duncan is accused by the Grand Jury of the City and County of San Francisco of the crimes of grand larceny, embezzlement, and forgery—three indictments for embezzlement, eight for forgery, and one for grand larceny. That the Judge of the Municipal Criminal Court, the indictments having been transferred to that court for trial, made an order holding said Duncan to bail to answer said charges in the sum of \$112,000. That said Duncan is unable to give said bail, and is now confined in jail; but that relatives and friends of said Duncan have offered to give bail for him in the sum of \$50,000. The affiant avers that there is prevailing at present a contagious disease among the prisoners, and further that by reason of the confinement of said Duncan his life is endangered, etc., and praying that he be admitted to bail in the sum of \$50,000.

Alfred A. Cohen, for Petitioner.

D. J. Murphy, District Attorney for the People.

PER CURIAM.

As observed at the argument, we must assume in this proceeding that the petitioner is guilty of the ten distinct felonies of which he is indicted. We must assume his guilt, though when he shall be tried it may be made to appear that he is wholly innocent of all the charges.

We said in *Ex parte Ryan* (44 Cal. 558), that "except for the purpose of a fair and impartial trial before a petit jury the presumption of guilt arises against the prisoner upon the finding of an indictment against him," and this must be taken to be the settled rule.

Assuming, then, that the prisoner is guilty of these several felonies, we are asked to say that the bail demanded of him in the Municipal Criminal Court is "*excessive*," within the inhibition of the Constitution.

The question is not whether we would have exacted so great a sum in the first instance had the proceedings to let him to bail been originally before us—in other words, the inquiry is not whether a mere difference of opinion may have

been developed between this court and the Municipal Criminal Court as to the amount of bail to be exacted in the case. We are not to assume in this case the functions of the court committing the prisoner, or substitute our own for its judgment in fixing the amount of bail. Before we are authorized to interfere the bail demanded must be (as was said in Ryan's case, *supra*,) "*per se* unreasonably great and clearly disproportionate to the offense involved," etc.

A case might, of course, be presented in which the amount of bail demanded would be so great as to shock the common sense, and be seen to be utterly disproportionate to the offense charged, and in such a case it would be our duty to interfere. But the present case is not seen to be one of that character.

Prisoner remanded.

[UNWRITTEN OPINIONS.]

No. 5,972—*Phelps, administrator, respondent, vs. Arise, appellant.*—Action of ejectment; complaint is in ordinary form. Answer, a general denial and sets up that defendant, as a qualified pre-emptor settled on the lands, and performed all things necessary, etc. The findings show that intestate claimed ownership in fee; that the lands were listed to the State of California as part indemnity for lands alleged to be lost to the State by reason of being included within a certain Mexican grant, said listing having been approved by the Secretary of the Interior of the U. S. April 2, 1870; that a patent, based on an application to purchase by one Worth, was issued to plaintiffs intestate by State of California in 1873; that defendant entered on portion of the land on April 15, 1876, and claims to hold adversely to plaintiff, etc.

Judgment for plaintiff. Defendant appealed.

Defendant argues that Worth's application was defective and void, it was not accompanied by the affidavits of three disinterested persons, stating among other things that the applicant is a resident of the State, and that the lands are unoccupied by any person except applicant, as required by

Statute of April 27, 1863, p. 533. The application was presented to the State Locating Agent and by him accepted, and selection and location made without authority of law, and made *while the land was reserved from appropriation*, the township plat being suspended and the land practically unsurveyed. The land was applied for, selected and located in lieu of land not lost to the State, it was never granted to the State by any act of Congress, and the application, selection, location and listment to the State was without authority and void, and the defendant is in such privity with the paramount source of title as enables him to attack the patent. Listing of this land to the State conveys no title by act of Congress, August 3, 1854.

Plaintiff asserts that all defects in the proceedings taken for acquisition of the title to the land by the State were cured, and the title confirmed to the State by act of Congress, approved March 1, 1877.

The appellant is a stranger, not in privity with the paramount source of the title, and can not be heard to question validity of plaintiff's patent. He entered as a pre-emptioner and offered to file his declaratory statement, but it was declined. He offered his proof and payment but it does not appear when, whether *before* or *after* the passage of the act of Congress, March 1, 1877. The answer does not aver a tender, but even if he had tendered *prior* to that act, which it does appear he did, he would have no rights which would prevent Congress making such disposition as it saw fit.

Barclay & Wilson and Gould & Blanchard, for appellant.

Cited Statutes 1863-4 p. 301; 51 Cal. 131; 44 Cal. 380; No. 5438, April Term, 1877; Act of Congress, March 3, 1853 (1 Lester Land Law, p. 207); 23 Cal. 431; 24 Cal. 609; 29 Cal. 317; 50 Cal. 16; 40 Mo. 310.

Thom & Ross, for respondents.

Cited *Frisbee vs. Whitney* reported in 9th Wallace, referred to by Supreme Court of U. S. in *Hutchings vs. Low*, 15th Wallace, 87; 46 Cal. 549; 40 Cal. 373; 27 Cal. 483; 24 Cal. 630.

Supreme Court of the United States,

OCTOBER TERM, 1878.

BARNEY, PLAINTIFF IN ERROR, vs. DOLPH.

A husband and wife who had perfected their right to a patent for lands in Oregon under the Donation Act of September 27, 1850, and after the amendment of 1854, can, before receiving the patent, sell and convey the lands so as to cut off the rights of the children or heirs of the husband or wife in case of his or her death, before the patent is actually issued.—[EDITOR LAW JOURNAL.]

In error to the Supreme Court of the State of Oregon.

Mr. Chief Justice WAITE delivered the opinion of the Court.

The only question within our jurisdiction presented by this record is, whether after a husband and wife had perfected their right to a patent for lands in Oregon, under the Donation Act of September 27, 1850, (9 Stat., 496,) and after the amendment of 1854, (10 Stat., 806,) they could, before receiving the patent, sell and convey the lands so as to cut off the rights of the children or heirs of the husband or wife, in case of his or her death before the patent was actually issued.

This depends upon the effect to be given the original act when construed in connection with the amendment. The original act, after providing for a grant to the husband and wife of six hundred and forty acres of land, one-half to the husband and one-half to the wife in her own right, declared that "in all cases where such married persons have complied with the provisions of this (the) act so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament, duly and properly executed according to the laws of

Oregon;" and then, "that all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act before he or they shall have received patent therefor, shall be void." The amendment of 1854 repealed this prohibition of sales.

The point to be decided is not whether, before the amendment, such a conveyance could have been made, or whether if the conveyance had not been made the children or heirs of a deceased husband or wife would take by descent or purchase, or whether the grant from the United States was one which took effect from the time of the passage of the act, or a subsequent entry and settlement, but whether, after the amendment, the husband and wife held by such a title that, before patent, but after their right to one had become absolute, they could sell and convey so as to vest in the purchaser either a legal or equitable estate in fee simple—legal, if the title had already passed out of the United States by virtue of the act of Congress, and a full compliance with its provisions—equitable, if the patent was needed to perfect the grant. The question is one of legislative intent, to be ascertained by an examination of the language which Congress has used, and applying it to the subject-matter of the legislation.

The reason of the exceptional policy of the United States in respect to the public lands in Oregon is to be found in the exceptional condition of the inhabitants of that territory when the government of the United States exerted positively its jurisdiction over them. For more than thirty years, under the operation of treaty stipulations between the two countries (8 Stat., 249 and 360), the citizens of the United States and the subjects of Great Britain had been permitted to occupy jointly the territory afterwards included in that State. They had no government except such as they had organized "for the purposes of mutual protection and to secure peace and prosperity among" themselves. The actual condition of affairs is graphically described in

Lownsdale vs. City of Portland (Deady's Rep., 11), by the able and experienced Judge of the district of Oregon, who has been connected with the administration of justice there for more than a quarter of a century, and was considered by this court in *Stark vs. Starrs*, (6 Wall. 415); *Lamb vs. Davenport*, (18 Wall. 313), and *Stark vs. Starr*, (94 U. S. 486). As part of their plan of government they established a "Land Law," by which free males over the age of eighteen years were permitted to occupy and hold six hundred and forty acres of land, and regulations were adopted for designating claims and protecting the occupants in their possession. While not denying to the United States the ownership of the soil, the occupants, to all intents and purposes, used and dealt with the lands they severally claimed as their own.

Finding this to be the condition of affairs, and recognizing the equitable claims of the inhabitants, Congress, within two years from the time of the organization of the territorial government, passed the Donation Act, which was framed so as to conform in a large degree to the regulations of the old system, and to grant to the original settlers holding under that system the whole, or a considerable portion, of the lands they had been occupying and cultivating. Section 4 was evidently intended for the special benefit of this class, and, stripped of details, in effect granted to the white settlers then residing in the territory, over eighteen years of age and citizens of the United States, or intending to become such, a half section of land if single, or a whole section if married, one-half to the husband and one-half to the wife, provided they had resided upon and cultivated the land, or should do so, for four consecutive years, and otherwise conformed to the provisions of the act. Then follows, in this section, the provision which has already been cited in respect to the disposition of the property in case of the death of one of two married persons after they had complied with the provisions of the act and become entitled to a patent, but before the patent was actually received by

them. The language used evidently confines this limitation in its effect to the married persons mentioned in this section.

Section 5 made provision for those coming into the territory and settling after December 1, 1850, and above the age of twenty-one years. It granted them, if single, one hundred and sixty acres, and, if married, three hundred and twenty, one-half to the husband and one-half to the wife, upon the same conditions of residence, cultivation, and conformity to the act specified in Section 4. Other sections required the settler, within three months after the survey of the lands had been made, or if the survey had been made when the settlement commenced, within three months after the commencement of the settlement, to notify the Surveyor-General of the precise tract he claimed, and within twelve months to prove to the satisfaction of the same officer that the settlement and cultivation required by the act had been commenced, specifying the time of the commencement. At any time after the expiration of four years from the date of the settlement, whether made under the laws of the late provisional government or not, the settler might prove to the Surveyor-General the fact of the continued residence and cultivation required, and that being done, it became the duty of the Surveyor-General to issue certificates, setting forth the facts of the case and specifying the land to which the parties were entitled, and to return the proofs taken to the Commissioner of the General Land Office, when, if no valid objections were found, patents were to issue according to the certificate, upon the surrender thereof.

Sec. 8 provided, that upon the death of any settler before the expiration of the required four years continued possession, all his rights should descend to his heirs, including the widow, where one was left, in equal parts, and that proof of compliance with the conditions of the act up to the time of the death should be sufficient to entitle them to a patent.

The prohibition of sales, although contained in Sec. 4, applied to all persons entitled to the benefit of the act, and its repeal was, under the circumstances, equivalent to an ex-

press grant of power to sell. The prohibition was of the sale, before patent, of the *land* to which the settler was entitled under the act. The repeal, therefore, operated under the circumstances the same as a grant of power to sell the *land* even though a patent had not issued. This, in the absence of anything to the contrary, implied the power to convey all the government had parted with.

When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. We so decided in *Stark vs. Starrs*, (6 Wall. 418). The execution and delivery of the patent after the right to it is complete is the mere ministerial act of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured, was, as to the government, a transfer of the ownership of the land.

We are thus brought to the consideration of the question whether such a sale by married persons, entitled to the benefit of the fourth section of the act, would transfer to the purchaser the interest of the children, heirs, or devisees of a husband or wife, who died after the sale, but before the patent was actually received. This depends upon whether the repeal of the prohibition of sales was, in effect, the repeal of the provision in respect to the child, heir, or devisee, in cases where sales were made.

Repeals by implication are not favored, but if there is a positive and irreconcilable repugnancy between the old law and the new, the new must stand and the old fall, even though the result is reached by implication alone. After all, the question is one of legislative intent, to be ascertained by an examination of both statutes, the rule being that the two are to stand unless the contrary is manifested beyond a doubt.

As has been seen, the limitation is confined to such married persons as took under the fourth section of the act, where provision is made for those who, in the language of Judge DEADY (*Deady's Reps.* 11), "had built towns, opened

and improved farms, established churches and schools, and laid out highways," and who, when the United States assumed exclusive governmental control of the territory, were found "engaged in agriculture, trade, commerce, and the mechanical arts." These, it may fairly be presumed, were special objects of the bounty of the government. The prohibition of sales was undoubtedly intended to protect the United States to some extent against fraudulent claims, and at the same time to place an obstacle in the way of an improvident disposition of their property by the settlers under the influence of the new order of things, but at all times the husband or wife taking under Sec. 4 could cut off a child or heir by will. The prohibition was in respect to *sales*, and the power to *devise* was expressly given this class of beneficiaries. It is clear, therefore, that the limitation was not intended altogether for the benefit of children or heirs.

The delay which necessarily attended the delivery of the patents after settlers had become entitled to them under the law, oftentimes operated with great hardship upon those whom Congress intended to assist. In view of this, after the expiration of nearly four years from its enactment, when the government needed no more time for the detection of frauds, and the people had become accustomed to their change of circumstances, the prohibition of sales was removed, evidently in the interest of the settlers. After this, confessedly, all who had perfected their right to a patent for the lands they had occupied and cultivated for the requisite length of time, other than the married beneficiaries under Sec. 4, could sell and convey to the purchaser an indefeasible estate, and there certainly does not seem to be any good reason why these special objects of regard should be made an exception to this general rule. It was a part of the original donation *system* to keep all the donated lands from *sale* until the patents issued, but as soon as the patents were delivered all conditions were withdrawn and all restraints removed. When the settler, whether married or single, became an actual patentee, he could sell and convey in fee.

The land was his own to dispose of as he chose. All that prevented his doing so before, after his right to the patent had been perfected, was the prohibition of sale.

After this prohibition was taken away the system was radically changed, and a perfected right to a patent was made as good as the patent itself for all purposes except the mere convenience of proving title. A grant by Congress, under these circumstances, of the right to sell the *land*, must have been intended to authorize those entitled to patents to convey in the same manner they could if the patent had been actually delivered. Any provision in the act transferring the title of the settler, in case of his death before receiving the patent, to his child, heir, or devisee, is palpably inconsistent with an unlimited power to sell and convey the land. The two can not stand together, and, consequently, the power of sale, which was the latest enactment, must prevail. In this connection it is worthy of remark that the devisee of the settler dying before patent is as much entitled to take under the law as a child or heir. Certainly it could never have been the intention of Congress to allow a settler to defeat a conveyance by a subsequent will. But if the child or heir could take, so must the devisee.

But there is still another argument in favor of the repeal, which is equally cogent. There can not be a doubt that the great object of the law was to invest the early settlers of that territory with complete ownership of the land they had resided upon and cultivated, while the ownership of the soil was in controversy between the two sovereign claimants. The authority to sell before patent was an additional boon granted by the government. The retention of the original limitation in favor of the children, heirs, and devisees must necessarily affect materially the value of the title which could be conveyed. It operated against no one except married settlers residing in the country on or before Dec. 1, 1850. This would necessarily include those making their claims by reason of possession taken under the provisional government, and it will not for a moment be presumed that

this specially deserving class of settlers were alone to be incumbered by such a restriction on their title.

In conclusion, we hold that the conveyance by Waymire and wife, after they had secured the right to a patent, but before the patent had issued, passed the fee, or an equitable right to the fee, to their grantees, and consequently that there was no error in the court below.

Judgment affirmed.

United States Supreme Court Abstracts.

Criminal Law—Statute of Limitation—Withholding Pension Money.—Indictment for withholding pension moneys paid to defendant as agent and attorney for another; plea, the Statute of Limitation of two years as a bar. The trial Judges certified that it appeared on the trial that the pensioner demanded her money of defendant on the 24th of December, 1870, and he refused to pay her, and had never paid her up to the finding of the indictment, September 15, 1875; that he requested the judge to instruct the Jury to acquit him because the offense was barred by the Statute of Limitations, which the court refused to do. *Held:* that the court erred; the crime was not a continuous one and the statute (Rev. Stats., Sec. 1044) was a bar. *United States vs. Irvine.* Opinion by MILLER, J.

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Current Topics.

ACCOMPANYING this number of the JOURNAL is an "Appendix" of unwritten opinions of our Supreme Court which we hope will be of value to our subscribers. We will issue them as often as will be found necessary and convenient. We can not claim for these cases the dignity or value of an authority (except perhaps in a few cases), because the record often presents two or more issues either of which the appellate may have considered, and in the absence of a written expression we can not draw a safe and positive conclusion; yet as compilations of authorities upon given subjects they are sure to be of great value and aid.

THE following notice has been given by the Clerk of the Supreme Court:

The calendar for the April term at Los Angeles will be made up on the 22d day of March, 1879, and will consist of all criminal cases on file, and all civil cases from the counties of Santa Barbara, Ventura, Kern, Inyo, San Bernardino, San Diego, and Los Angeles.

The calendar for the May term at Sacramento will be made up on the 19th day of April, 1879, and will consist of all criminal cases on file, and all civil cases from the counties of Alpine, Amador, Butte, Colusa, El Dorado, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, Sierra, Sutter, Shasta, Siskiyou, Tehama, Tuolumne, Trinity, Yolo, and Yuba.

Cases from other counties may be placed on either calendar by stipulation, to be filed with the Clerk at his office in San Francisco on or before the time above mentioned for the making up of the respective calendars.

By order of the Chief Justice. D. B. WOLF, Clerk.

Supreme Court of California.

JANUARY TERM.

[No. 10,876.]

[Filed March 10, 1879.]

PEOPLE vs. SPRAGUE.

1. In this case the District Court was justified in denying a motion for a continuance.
2. An order excluding from the court-room such of the jurors summoned for the term as are not impaneled to try the case is not a deprivation of the right of public trial.
3. The Trial Court may make an order excluding from the court-room all the witnesses but the witness under examination.
4. An affidavit of a jurymen is not receivable to impeach his verdict.
5. It is not error to refuse an offered instruction—"A witness false in one part of his testimony is to be distrusted in others," when an instruction is given in these words: "A witness willfully false in one part of his testimony is to be distrusted in others."
6. The failure of the Clerk of the court to read the indictment and to state the defendant's plea, was not fatal error—it appearing that the jury were from the commencement of the trial fully informed of the precise charge against the defendant and of the issue raised by his plea of not guilty.
7. On hearing an appeal this court will give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of a defendant.

Appeal from the First District Court, Ventura County.

The defendant was indicted for murder. At the trial he moved for a continuance on the grounds of great excitement and prejudice against him, so that he could not safely go to trial, and also upon the grounds of the absence of material witnesses. It was the first motion for a continuance. No motion for change of venue was made. The court denied the motion.

The jury found defendant guilty and he appealed.

The remaining facts appear in the opinion.

Creed Haymond, James D. Fay, Hines & Brooks, N. C. Bledsoe, and W. W. Allen, for defendant.

J. Hamer, L. C. Granger, W. F. Williams, Frank Ganahl, B. F. Williams, James G. Howard, and N. Blackstock, for plaintiff.

McKINSTRY, J., delivered the opinion of the court.

The court below was justified in denying defendant's motion for a continuance.

The order excluding such of the jurors as were not impaneled to try the case was not a deprivation of the right of *public trial*.

The wife and daughters of defendant were witnesses, and were properly included within the order which excluded from the court-room all witnesses but the one under examination.

The court properly held that the affidavit of a juror could not be received to impeach his verdict, and the alleged communication of the Deputy Sheriff (if it could be considered as proved) was utterly unimportant, and could not have influenced the verdict.

Defendant requested the court to charge the jury: "A witness false in one part of his testimony is to be distrusted in others."

The court gave the instruction after inserting the word "willfully" immediately before the word "*false*," and refused to give the charge as asked, to which the defendant excepted.

The maxim "*falsus in uno, falsus in omnibus*" is not to be construed as authorizing a court to charge that if a witness *perjures* himself in respect to one or more particulars, the jury must reject all his testimony. (*People vs. Strong*, 30 Cal. 156.) The rule is that the jury *may* reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; that is to say, the jury being convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but willfully and with the design to deceive, must treat all his testimony with distrust and suspicion, and reject all unless they shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth. The third subdivision of Section 2061 of the Code of Civil Procedure is but declaratory of the rule above considered, and by requiring a jury to distrust, necessarily authorizes them to reject all the testimony of such a witness, in a proper case. The word "false" is not the equivalent of "mistake" as contended for

by defendant's counsel ; the word "willfully" did not change the effect of the instruction as offered.

After the jury was impaneled and sworn, the clerk did not (as directed by Section 1093 of the Penal Code) read the indictment and state defendant's plea. It appears from the bill of exceptions, however, that during the impaneling of the jury the substance of the indictment and plea were many times repeated ; that in opening the case to the jury the District Attorney stated the substance of the indictment and also defendant's plea thereto ; that in the charge of the court the substance of the indictment and plea were again mentioned, and that the defendant made no objection to proceeding with the trial by reason of the failure of the clerk to read the indictment or to state the plea, nor in any way referred to the omission until after the verdict had been received and entered on the minutes, and the jury polled at defendant's request. Section 1404 of the Penal Code provides :

"Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right;" and Section 1258 of the same Code is as follows :

"After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties."

There can be no doubt that the jury were fully informed from the commencement of the trial of the precise charge against the defendant, and of the issue raised by his plea of "not guilty."

The departure from the form or mode of presenting the issue prescribed by the statute did not prejudice or tend to prejudice the defendant in respect to a substantial right, and it is therefore the duty of this court to give judgment without reference to an irregularity—the result of such departure.

Judgment and order affirmed.

We concur:

CROCKETT, J.

NILES, J.

RHODES, J.

WALLACE, C. J.

[No. 6,275.]

[Filed March 10, 1879.]

STEINBURG, RESPONDENT,

VS.

MEANY (Sheriff), APPELLANT.

A witness having testified that he managed certain property, as the agent of the plaintiff, his wife—the property having been attached at the suit of Newman, as the property of the witness—was asked on cross-examination: "What was the understanding between yourself and Newman relative to attaching these cattle, just previous to the commencement of the attachment suit?" *Held*, that the question was legitimate cross-examination.

A party by the examination of her husband as a witness in her behalf, waives her objection to his examination by the opposite party upon any of the issues in the action.

Appeal from the Thirteenth District Court, County of Merced.

Hewel & Turner and L. Quint, attorneys for appellant.

P. B. King and L. Hamilton, attorneys for respondent.

RHODES, J., delivered the opinion of the court.

The property in controversy had been attached by the Sheriff under a writ issued in an action brought by Newman against George Steinburg, the husband of the plaintiff; and the property is claimed by the plaintiff as her separate property. George Steinburg was called as a witness for the plaintiff, and testified that he managed the property as the agent of his wife. On cross-examination the witness was asked, "What was the understanding between yourself and Newman relative to attaching these cattle just prior to the commencement of the attachment suit?" But the question was objected to on the ground that it was not legitimate cross-examination, and the objection was sustained. The defendant then proposed to make him his own witness, and repeated the question, but the plaintiff objected to his answering the question, on the ground that the witness being the husband of the plaintiff could not be examined as a witness in the case without her consent, and the court sustained the objection.

The question proposed was legitimate cross-examination, in view of the testimony already given by the witness, either to show that he was not acting as the agent of the plaintiff in the management of the property, or to lay the foundation for his impeachment.

The defendant was also entitled to examine the witness as his own witness. The first subdivision of Sec. 1881, of the Code of Civil Procedure, provides that "a husband can not be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent." The plaintiff called and examined George Steinburg, her husband, as a witness, and on his examination he gave testimony in her behalf, which was both relevant and material to the issues involved in the action. The examination by her is to be deemed and taken as a consent on her part to his examination by the opposite party, in respect to any of the issues in the action.

Judgment and order reversed and cause remanded for a new trial.

We concur :

CROCKETT, J.

NILES, J.

McKINSTY, J.

WALLACE, C. J.

[No. 6,259.]

[Filed March 10, 1879.]

RICHARDS, RESPONDENT,

VS.

KIRKPATRICK ET AL., APPELLANTS.

A party is not entitled to an injunction in a case where he has a plain, speedy and adequate remedy at law.

An action of claim and delivery, instituted by such party, in which the Sheriff has taken, and is holding, the possession of the property, is a plain, speedy and adequate remedy as against a threatened sale of the property by a Constable, from whose possession it was taken by the Sheriff.

Appeal from the Thirteenth District Court, Mariposa Co.

The facts appear in the opinion.

Wigginton, Farrar & Barry, attorneys for appellants.

L. F. Jones, attorney for respondent.

RHODES, J., delivered the opinion of the court.

One of the defendants, Olcese, having obtained a judgment against Ivy, caused an execution to be issued, and the other defendant, as a Constable, levied the execution upon the personal property in controversy, as the property of Ivy, and is about to sell the same in satisfaction of the execution. Two days after the levy, the plaintiff commenced an action of claim and delivery against the Constable for the recovery of the property, and, as alleged in the complaint in this action, process was issued, by virtue of which the Sheriff took possession of the property. This action was instituted to restrain the sale of the property under the execution above mentioned, and was brought two days after the action of claim and delivery.

A party is not entitled to an injunction in a case where he has a plain, speedy and adequate remedy at law. (*Leach vs. Day*, 27 Cal. 643; *Rahn vs. Minis*, 40 Cal. 421.) No reason is given why the plaintiff could not obtain all the relief to which he is entitled, in the pending action of claim and delivery. While the property is held by the Sheriff under the process in that action, the Constable can not sell it, and should the property be redelivered by the Sheriff to the Constable upon his execution of the statutory undertaking, that undertaking is presumptively sufficient protection to the plaintiff should he recover a judgment in that action.

Order reversed and cause remanded.

We concur :

CROCKETT, J.

McKINSTRY, J.

NILES, J.

WALLACE, C. J.

[No. 5661.]

[Filed March 10, 1879.]

SALISBURY ET AL., RESPONDENTS,

v. VS.

SHIRLEY ET AL., APPELLANTS.

1. If a lease for ten years and six months contain a stipulation that in addition to the monthly rent the lessee will pay all taxes, rates or assessments which at any time during the term may be levied or assessed on the demised premises, the lessee is bound by the covenant to pay the taxes levied on the property during the last six months of the term.
2. But if the lease contain a further stipulation that if the net amount of rents received by the lessee from the demised premises, after deducting the taxes and assessments, in any one year during the term, be insufficient to pay the monthly rent, in that event the lessee should not be liable to pay more for the rent "nor upon the covenants of this lease" than such amount as he shall receive as the rents and profits of the property; this is, in legal effect, a stipulation, that during the last six months of the term, the lessee shall not be required to pay more for the monthly rents and for taxes levied during that period, than he shall have received during the same period, as rents and profits from the property.
3. In an action on the lease to recover from the lessee taxes paid by the lessors, and which were levied on the property during the last six months of the term, the complaint, in order to show a breach of the covenant, should contain an averment that during the six months the lessee had received as rents and profits from the property, a sum sufficient to pay the monthly rent and the taxes, and if the sum received be not sufficient to pay all the rent and taxes, it should at least be averred that some amount was received by the lessee during the six months, which would be applicable to the taxes.

Appeal from the Fifteenth District Court, City and County of San Francisco.

The facts appear sufficiently in the opinion.

Daniel Rogers and *G. F. Sharp*, attorneys for appellants.

R. P. & H. N. Clement, attorneys for respondents.

CROCKETT, J., delivered the opinion of the court.

In legal effect, the covenant in the lease was, that during the last six months of the term the lessee would pay the monthly rent, and all taxes, rates and assessments which, during the six months, should be levied or assessed upon the demised premises; but subject to the proviso, that if the net income from the property during the six months should be insufficient to pay the rent, taxes and assessments, the lessee was under no obligation to pay more than the net income

amounted to. In suing to recover the taxes levied during that period, it was incumbent on the plaintiff to show in the complaint a breach of the covenant, by an averment that the net income from the property during the six months was sufficient to pay the rent, taxes and assessments; and if not sufficient to pay the whole, the amount of the net income should have been averred, so as to show the amount, if any, applicable to the taxes. But there is no such averment, nor any equivalent averment in the complaint. Subdivision 14 of the complaint, which contains the only averment on the subject, is in these words:

"14. That in every year during the term of said lease, the net amount of rent received by the defendants from said premises after deducting all taxes and assessments levied or assessed on said premises and the improvements thereon, exceeded the sum of two hundred and fifty dollars per month; and the net amounts of rent by them received from said premises during the last year of said term was more than sufficient to pay said rent of two hundred and fifty dollars per month, and said tax of two thousand four hundred and twenty-three dollars and twenty-six cents, and all other rates, taxes and assessments on said premises and improvements."

The familiar rule is that a pleading is to be construed more strongly against the pleader; and the averment that "in every year during the term of said lease," and that "during the last year of said term" the rents and profits received by the lessee, were more than sufficient to pay the rent and the taxes levied during that year, can not be equivalent to an averment that during the last six months of the term, which was only a fraction of a year, the income from the property was sufficient to pay the rent and taxes during that fraction of a year. A year is twelve calendar months, and when the averment is that "during a year," or "in every year" during a term of years, a certain event happened, the natural construction of this language is that the event transpired during a period of twelve months. On the opposite construction, the averment of this complaint would apply as well to a period of one day in a year, as to a term of six months, each

being only a fraction of a year. If this lease had been for a term of ten years and three days, instead of ten years and six months, and if the action had been to recover taxes levied during the three days, to the amount of twenty-four hundred dollars, I apprehend an averment in the complaint, that "in every year during the term" the income from the property had exceeded the rents and taxes, and that "during the last year of said term" the income had been more than sufficient to pay the rent and the \$2,400 for taxes, could not be held on any reasonable interpretation of the language to be equivalent to an averment that the income from the property during the three days was more than sufficient to pay the rent and taxes; and that, too, in the face of the rule that a pleading is to be construed more strongly against the pleader—and that all reasonable doubts arising on the face of the pleading are to be resolved against him. We are of opinion that the complaint is defective in substance, for a failure to aver a breach of the covenant, and that the general demurrer to it ought to have been sustained. Moreover, there is reason to infer that the cause was tried on the theory that the averments of the complaints already quoted, referred to the last year of the entire term, counting back from September, 1869. We infer so from the fact that it was stipulated at the trial, that *during that year* the income from the property was more than sufficient to pay the rent and taxes. But on our construction of the lease, this was an immaterial circumstance, and we think the end of justice demand that the cause should be tried anew on amended pleadings.

Judgment and order reversed, and cause remanded with an order to the court below to sustain the general demurrer to the complaint.

We concur:

NILES, J.

McKINSTRY, J.

RHODES, J.

[No. 6,350.]

[Filed March 10, 1879.]

JOHNSON, RESPONDENT, vs. PERRY, APPELLANT.

The Act of April 4, 1870, "to secure a lien on live stock kept, fed or pastured by ranchmen and stable-keepers," was not repealed by the Codes.

A judgment will not be reversed for a failure to find upon certain issues in the cause, if a finding upon all the issues would not require a different judgment.

Appeal from the Fifth District Court, San Joaquin County.
The facts appear in the opinion.

F. T. Baldwin and J. C. Campbell, attorneys for appellant.
Terry & McKinne, attorneys for respondent.

RHODES, J., delivered the opinion of the court.

It appears from the findings that there was due to the plaintiff, as the proprietor of a livery stable, \$291 25, for the care, keeping and feed of the horses, and for the safe-keeping of the other property mentioned in the complaint, under contract with Dunbar, the owner of all said property; that while he was in possession of, and keeping and taking care of the property, the defendant took the same from the possession of the plaintiff, and that the plaintiff notified the defendant of this lien upon the property, for the said indebtedness of Dunbar. The defendant justifies under an attachment, issued to him as a constable, in an action instituted by McCloud against Dunbar before a Justice of the Peace, and a judgment rendered by such Justice of the Peace in said action against Dunbar, and an execution issued upon the judgment.

If the plaintiff held a lien upon the property as the proprietor of a livery stable, the defendant was not justified in taking the property from his possession. (*Treadwell vs. Davis*, 34 Cal. 601.) The Act of April 4, 1870 (Statutes 1869-70, p. 723), gives to the "proprietors of stables and ranches or farms" a lien upon "all live stock pastured, kept or fed by them, under contract with the owners thereof" for the amount due for the care and feed of such live stock; and authorizes them to recover and hold possession of such live stock until

the amount of such lien shall be paid. The Civil Code contains no provision expressly giving such lien to livery stable keepers; and unless Section 3051 of the Civil Code is to be construed as extending to such cases, the above mentioned Act of April 4, 1870, remains in force, because not repealed by the Codes. That section seems to be limited to a lien for the compensation due for "*labor or skill* employed for the protection, improvement, safe-keeping or carriage" of personal property lawfully in his possession, but does not extend to the expenses of "*feed or pasturage*" of animals. We are, therefore, of the opinion that the Act of April 4, 1870, was not repealed by the Codes, and that the plaintiff held a lien upon the property in controversy, under the provisions of that Act. (Section 3051 was amended in 1878, so as to give liens to proprietors of stables and others for the care and feeding of horses and stock.)

The court failed to find the facts in respect to the proceedings and attachment under which the defendant justified the seizure of the property. It is proper that the court should find upon all the issues in a cause, but if the same judgment would be rendered upon a finding upon all the issues, as is required upon the facts as found, the omission to find upon a part of the issues, is not an error of which either party can complain. Judgment and order affirmed.

We concur :

CROCKETT, J.

NILES, J.

WALLACE, C. J.

McKINSTRY, J.

[No. 10,391.]

[Filed March 10, 1879.]

PEOPLE vs. SOTO.

1. In a prosecution for burglary, the intent with which the defendant entered the building is a question of fact for the jury.
2. If a person enters an inhabited building through a window clandestinely, at a late hour at night, after the lights have been extinguished, the jury will be justified from these circumstances in finding that the entry was with the intent to commit larceny.

3. The testimony of a woman sleeping in the building, who had no previous knowledge of the defendant, that she believed the entry was made for the purpose of having sexual intercourse with her, if admissible as evidence, could not be held to establish the intent of defendant conclusively. It was for the jury to determine the intent.

Appeal from the County Court of Contra Costa.

F. M. Warmcastle, for the People.

Eli R. Chase, for defendant

CROCKETT, J., delivered the opinion of the court.

The defendant was indicted for burglary, in having entered a dwelling house in the night time, with the intent to commit petit larceny. The proof was that the defendant at a late hour of the night, after the family had retired and the lights had been extinguished, entered the building through a window and was found in a bed-room, in which a woman and three infant children were sleeping in one bed; that he seized the woman by the throat and threw himself across the bed, but on her making an outcry left the building without any further act of violence, and without having committed a larceny, so far as the evidence shows. The woman further testified that she had no previous knowledge of the defendant, but stated it as her belief that his purpose in entering the building was to have sexual intercourse with her. On this evidence the jury found the defendant guilty as charged in the indictment, and the defendant appeals.

The only ground relied upon for the reversal of the judgment is, that the verdict was not justified by the evidence, which, it is contended, did not tend to prove that he entered the building with the intent to commit larceny. But the intent with which he entered was a question of fact for the jury; and though there was no direct evidence of the intent, it might be inferred from the surrounding circumstances. The weight to be given to these was a question properly left to the jury; and when a person enters a building through a window at a late hour of the night, after the lights are extinguished, and no explanation is given of his intent, it may well be inferred that his purpose was to commit larceny, such being the usual intent under these circumstances. The be-

lief of the woman that he entered with further intent to have sexual intercourse with her is of no consequence. It was for the jury to determine the intent, and whether her belief was entitled to any weight. Judgment and order affirmed.

We concur :

NILES, J.

McKINSTRY, J.

RHODES, J.

(WALLACE, C. J., did not express an opinion.)

[No. 6,198.]

[Filed March 10, 1879.]

MAXWELL, PLAINTIFF AND RESPONDENT,

VS.

BOARD OF SUPERVISORS OF STANISLAUS COUNTY,
DEFENDANTS AND APPELLANTS.

1. A citizen and tax-payer of a county may apply for *certiorari* to annul an order or resolution of the Board of Supervisors made in excess of the jurisdiction of the Board when exercising judicial functions.
2. The Board of Supervisors of a county has no power to contract for any of the county printing, without the ten days' public notice, that such contract will be let to the lowest bidder, which is required by Section 4047 of the Political Code.

Appeal from the Fifth Judicial District, Stanislaus County.

Hewel & Turner, Caldwell & Minor, and L. Quint, attorneys for appellants.

Terry, McKinne & Terry, and W. L. Dudley, attorneys for respondent.

McKINSTRY, J., delivered the opinion of the court.

This was a proceeding in the District Court of the Fifth Judicial District, in and for the county of Stanislaus, by writ of *certiorari*, to review the action of the Board of Supervisors in making and entering into a contract for and on behalf of the county of Stanislaus, with one J. D. Spencer, to do certain county printing for Stanislaus County. On the 9th day of February, 1878, the Board of Supervisors, while in regular session, passed the following resolution :

"*Resolved*, That this Board, by, for and on behalf of said county, do enter into an agreement with the said Spencer, * * that for the period of three years * * after this date all proceedings of this Board, the reports, statements, and advertisements of the officers of this county, for which the county is liable, be published in the *Stanislaus County Weekly News*, at the following rate [the rates here follow], the same to be paid for quarterly, out of the general fund of said county, not otherwise appropriated."

Said Board, also at the same time, made and entered of record the following resolutions :

"*Resolved*, That no bills for publishing or advertising be allowed by this Board, contrary to the above resolution."

"That the District Attorney be requested to draw an agreement in conformity with the above resolution, and that the same be signed by the Chairman of this Board and in behalf of the Board."

Under and by virtue of these resolutions the contract was made, of which the petitioner complains, a copy of which is attached to the petition.

The petition shows that said contract was made by said Board *without advertising or giving any notice whatever that said Board would entertain or receive sealed proposals or bids to contract for the county printing of Stanislaus County*. And furthermore, that it was made without giving *any notice*, public or otherwise, that the contract for such printing would be let by the county through its Board of Supervisors, to the *lowest bidder*, or would be let at all.

When the case was called for hearing, on the return of the writ, the Board, by its counsel, moved to quash said writ, and also demurred to the petition. The motion was denied, the demurrer overruled. Whereupon judgment was entered vacating and annulling the orders and contract set up in the petition. The appeal is from the judgment.

The petitioner is a citizen and tax-payer of the county. The first point of the appellant is, that the petitioner is not authorized to apply for the writ, because not "*beneficially interested*" within the meaning of Section 1069 of the Code of Civil Procedure.

Linden vs. Board of Supervisors (45 Cal. 7), was *mandamus*—the claim being that a public duty had been imposed on the defendants by reason of a certain petition signed and presented by a large number of persons, but it did not appear that any pecuniary interest of the plaintiff was involved. *McCoy vs. Bryant* (also cited by appellant), was a bill for an injunction, and it was held that the tax-payer could never be injured by certain bonds issued by the city authorities of San Diego, inasmuch as the bonds were absolutely void in the hands of any and every holder. Neither of these cases are exactly in point.

The other cases called to our attention by appellant, *Com. vs. Rossiter* (2 Binn. 262), *Heffner vs. Com.* (28 Pa. 108), and *State vs. School Fund* (4 Kan. 261), were applications for writs of *mandamus*. In such cases a command is sought compelling a defendant to affirmative action, and it has always been held that a relator or applicant must have a right which is specific, complete, and legal, and for which he has no other specific and equally adequate remedy. The neglect of a public officer to discharge a public duty may affect the interest of every tax-payer, but such result must in ordinary cases be uncertain and dependent upon contingencies. When, however, a public board or officer has exceeded the limited powers conferred by law, and the direct consequence of such excessive use of authority must be to add to the burden of local taxation, it clearly appears that, unless the act *ultra vires* be annulled, each tax-payer must suffer injury, common in character, but special in amount or degree.

It would seem that one thus directly affected should be entitled to a remedy, and our conclusion is that petitioner was authorized to commence this proceeding.

The second point made by appellant is: "Petitioner alleging the orders, resolution and contract to be *void*, was bound by the allegation, and neither himself nor any one else could be injured."

Under our practice (C. C. P. 1068) the writ can *only* issue when there is an excess of jurisdiction.

We shall assume, as was assumed by counsel at the argu-

ment, that in providing for the publication and printing of the matters mentioned in the resolution and contract the the Board was exercising *judicial functions*.

The main question presented is : "Had the Board power to pass the order or resolution and to make the contract referred to?"

Among the enumerated powers of the Supervisors are : "To contract for the county printing and provide books and stationery for the county officers." "At the adjournment of each session of the Board to cause to be published in a newspaper, or otherwise, a fair statement of all their proceedings, and semi-annually a statement of the financial condition of the county." (Political Code, Sec. 4046, Subs. 21, 22.)

Section 3764 of the same Code requires the Tax Collector to *publish* a "delinquent list," and provides, "The expense of the publication to be a charge against the county." Section 1055 makes it the duty of the Supervisors to cause a copy of each "Election Proclamation" to be published in some "newspaper (if any) *printed* in the county." By Section 3654 the Clerk of the Board is required to give notice of the time the Supervisors will meet to equalize taxes—"by publication in a newspaper if any is printed in the county." The Tax Collector's notice that taxes will be delinquent at a certain date, must, in every case, be published in some newspaper published in the county if there be one. (Sec. 3749.) Notice of sale must be printed in a newspaper, if any. (Sec. 3766. See also Sections 3792, 3882-3.)

If any of the matters referred to are, as they may be, published by *printing*, and the county is liable, as it is, for the expense of the printing, such printing is *county printing*.

Section 4047, as the same was prior to the amendments of 1878, read : "All contracts for—1. *County printing* ; 2. Books and stationery ; and 3. Supplies for county institutions, must be made with the lowest bidder, and after ten days' notice that the contract will be let. The bidding must be by sealed proposals."

It would be giving a forced construction to the language employed to say that it was intended that a portion only of

the printing for which the county would be obliged to pay should be advertised. But as if to remove any possible impression of that character (if any such existed), the amended section (4047) provides that contracts for "ALL county printing" must be made with the lowest bidder.

The resolution passed and contract made with the *Stanislaus County Weekly News*, in the absence of the ten day's public notice for bids, are void.

It will be understood that there is nothing in the foregoing which holds it to be the absolute duty of the county authorities to contract for printing with the lowest bidder, in case of fraudulent collusion between the bidders, or other fraud. Judgment affirmed.

We concur :

CROCKETT, J.

RHODES, J.

NILES, J.

[No. 10,374.]

[Filed March 10, 1879.]

PEOPLE vs. WHITNEY.

When the record does not present any of the evidence upon a point to which an instruction relates, it will not be assumed that evidence was introduced which made it necessary to modify the instruction as given; but it will be assumed that the instruction was correct, if it was legal and proper in any conceivable state of the evidence legally admissible upon the point.

An instruction that "a juror has no right to disbelieve the evidence, as a juror, while he believes it as a man. If, therefore, from the evidence in the case, you believe as men that the defendant is guilty, you should as jurors believe him guilty," is not erroneous, though it is useless.

Appeal from the County Court of Siskiyou County.

Jo Hamilton, Attorney-General, for the People.

E. Steele, of counsel for defendant.

RHODES, J., delivered the opinion of the court.

The evidence is not contained in the record. In reviewing an instruction, it will be assumed that the state of the evidence was such as to warrant the instruction, if it would

be legal and proper in any conceivable state of the evidence; but in the absence of the evidence from the record it will not be assumed that evidence was introduced, which would require a modification or qualification of any instruction as given. We can not, therefore, determine from the record before us that the fifth instruction required any qualification or modification.

At the request of the District Attorney, the court instructed the jury that: "A juror has no right to disbelieve the evidence, as a juror, while he believes it as a man. If, therefore, from the evidence in the case, you believe, as men, that the defendant is guilty, you should, as jurors, believe him guilty." In *Com. vs. Harman* (4 Barr. 269), Mr. C. J. Gibson, in commenting upon circumstantial evidence, said that "all evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief—that is, actual and not technical disbelief; for he who has to pass on the question is not at liberty to disbelieve as a juror while he believes as a man." The instruction, it may be assumed, was taken mainly from the language above cited; but by directing the attention of the jurors to the *evidence*, and not merely to the question of the guilt of the defendant, or even to the ultimate facts to be established by the prosecution, it avoids the objection stated by Mr. Justice DILLON in *State vs. Collins* (20 Iowa, 98), and, in our opinion, was not calculated to mislead the jury.

The only objection to the instruction is that it is useless, and that, having been given, it affords the defendant an opportunity to bring it up to the court for review. It is not to be presumed that jurors would, from the charge of the court, the arguments of counsel, or anything transpiring at the trial, entertain the idea that in becoming jurors they had ceased to be men, or had acquired any new capacity by which they might test the truth of evidence; it was, therefore, as unnecessary to instruct them that a juror has no right to disbelieve the evidence as a juror, while he be-

believes it as a man, as it would have been to charge them that in becoming jurors they had not lost the capacity which they possessed as men to distinguish truth from falsehood or mistake.

Judgment affirmed. Remittitur forthwith.

We concur:

CROCKETT, J.

FILES, J.

Notes of Recent Decisions.

Negotiable Note.—A negotiable promissory note may be indorsed and transferred after as well as before maturity, the indorsee in the latter case taking subject to all equities between the antecedent parties to it. The defenses against which an indorsee has to guard in taking an overdue note are: First, those which have arisen since the execution of the note, and which are not collateral, but which relate to the note itself; and secondly, those which are inherent in the note, and which would show it to have been void *ab initio*, such as fraud, mistake or absence of a sufficient consideration. In a suit by the indorsee against the maker upon an accommodation note indorsed by the payee when over due, the maker can not set off a note given to him by the payee.

If a loss occurs by which one of two innocent persons must suffer, that one should sustain the loss who has most trusted the party through whom the loss came. (*Eversole vs. Maull*. Ct. of Appls. of Md. Oct. Term, 1878.)

1. *Jurisdiction: Circuit Court of Baltimore in equity over trustee.*—The Circuit Court of Baltimore, as a court of equity, has authority to appoint a trustee in the stead of a deceased trustee. (*Hall vs. Bryan*. Ct. of Appls. of Md. Oct. Term, 1878.)

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Current Topics.

A QUESTION of some importance is now before Judge Morrison, of the Fourth District Court. A motion has been made to vacate an order of that Court staying proceedings on account of the filing of a petition in insolvency by the defendant. The action was commenced before the petition was filed, for the recovery of rent under a written lease. The personal property of the defendant was attached to secure the amount due. The point specially urged by plaintiff is, that a discharge under the insolvency laws would not discharge the defendant from the payment of rent, nor from the obligations of the lease. Plaintiff's counsel contend that a lien exists at common law for rent, and as the Bankrupt Law respected liens, so must the State Insolvency Laws. Many authorities are cited to support the proposition. When the case has reached a decision we will note it more fully.

UNDER the present Constitution the cost of the Judiciary is \$265,300 per annum. The State contributes \$157,000 and the counties \$108,300. Under the proposed Constitution the Judiciary will cost the State \$159,000 and the counties \$117,000, making a total of \$276,000; and showing a difference of \$10,700 in excess of the present system.

THE Supreme Court of the United States, in *Chicago & N. W. R. R. Co. vs. McKinley*, recently decided that after judgment in a cause in a State Court has been reversed, on appeal and a new trial ordered, the right to a new trial must be perfected absolutely before a party is entitled to remove it into the U. S. Circuit Court, under the Statute of March 3, 1875.

Supreme Court of California.

JANUARY TERM, 1879.

[No. 6,318.]

[Filed March 10, 1879.]

ESTATE OF CLARK, DECEASED.

If an Executor mingle the money of the estate with his own, and employs the joint fund for a series of years in conducting the business of farming, he shall be charged, on the settlement of his account, with legal interest, to be computed with annual rests ; and the same rule will prevail even though it appear that he was at all times able to respond for the trust fund, whenever payment of it should be properly demanded.

Appeal from Probate Court of Humboldt County.

(The opinion sufficiently explains the case.)

J. J. De Haven, Attorney for Executor and Appellant.

J. N. Melendy and *W. H. Brumfield*, Attorneys for Rep't.

There is no difference in principle between the present case and that of the estate of Stott, decided at the July term, 1877. In that case and in this, the Executor mingled the trust fund with his own, and employed it in his business. In the former case the Executor was a merchant, and for a series of years used the money of the estate, mingled with his own in his business ; while, in the present case, the Executor was a farmer, and used the trust fund in conjunction with his own for a number of years in conducting his farming operations. From the very nature of their transaction, it would be extremely difficult, and perhaps impracticable, to ascertain with any degree of accuracy, what profit was realized from the trust fund ; and in the case of the estate of Stott, we held that the proper rule in such cases was to charge the Executor with legal interest, computed with annual rests. It was shown that the Executor in the former case, and in this, were at all times able to respond for the trust fund whenever its payment should be properly demanded ; but we held that this circumstance did not exonerate them from interest, to be computed with annual rests—as above stated.

Judgment and order reversed, and cause remanded, with an order to the court below to modify its judgment in accordance with this opinion.

CROCKETT, J.

We concur :

RHODES, J.

NILES, J.

McKINSTREY, J.

[No. 10,360.]

[Filed March 12, 1879.]

PEOPLE, RESPONDENT, vs. AUBREY, APPELLANT.

- 1.—In a criminal case, an appeal to the Supreme Court will not lie, unless the offense of which the defendant was convicted amounts to a felony.
- 2.—Under section 17 of the Penal Code, if the defendant was indicted for an assault with a deadly weapon with the intent to commit murder, and was convicted of an assault with a deadly weapon, and was thereupon sentenced to imprisonment in the county jail, the offense of which he was convicted was only a misdemeanor, and no appeal lies.

Appeal from County Court of Placer County.

(The facts appear in the opinion.)

W. H. Bullock, District Attorney, for the People.

B. F. Myers, Attorney for Appellant.

The defendant was indicted for an assault with a deadly weapon with the intent to commit murder, and was convicted of an assault with a deadly weapon, and was thereupon sentenced to be confined in the county jail for one year. From this judgment the defendant appeals, and the Attorney General moves to dismiss the appeal, on the ground that from such a judgment there is no appeal.

An appeal will not lie to this court in a criminal cause, except in cases amounting to felony, and section 245 of the Penal Code, as amended in 1874, provides that the punishment for an assault with a deadly weapon shall be "by imprisonment in the State prison or in a county jail, not exceeding two years, or by fine not exceeding five thousand dollars, or by both." Section 17 of the same Code provides that "a felony is a crime which is punishable with death, or by imprisonment in the State prison. Every other crime is a mis-

demeanor—or, when a crime punishable by imprisonment in the State prison, is also punishable by fine and imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the State prison." (Amendment of 1874.)

The offense of which the defendant was convicted was, therefore, only a misdemeanor, and no appeal lies from the judgment.

Appeal dismissed.

CROCKETT, J.

We concur ;

WALLACE, C. J.

NILES, J.

RHODES, J.

[No. 5,907.]

[Filed March 15, 1879.]

MARLOW, PLAINTIFF AND RESPONDENT,

VS.

BARLEW *et als.*, DEFENDANTS AND APPELLANTS.

A married woman has power to make a promissory note, and execute a mortgage of her separate real estate to secure its payment.

In an action brought upon the note and mortgage, the usual judgment may be rendered against her for the amount due on the note, and ordering that the mortgaged premises be sold, and a judgment be docketed for the deficiency.

Appeal from Third District Court, County of Alameda.

(The opinion renders a statement of this case unnecessary.)

E. M. Gibson, Attorney for Appellants.

Moore, Laine & Leil, Attorneys for Respondent.

Action to foreclose a mortgage of real estate. On the 3d day of July, 1874, John Hansen and Hannah Hansen, being the owners, as husband and wife, of certain community property, including the mortgaged premises in controversy, united in the execution of a deed purporting to convey all their community property to William Nelson, in trust, to the effect, that he should convey to John Hansen a certain portion of the community property, including the mortgaged

premises, to hold as his separate property; and also, that he should convey to Hannah Hansen the remaining portion of the community property, to hold as her separate property. Nelson thereupon, and in pursuance of the deed of trust, executed deeds, whereby he purported to convey to the respective parties the portion of the community property to which each was entitled, according to the terms of the deed of trust. Hannah Hansen also executed a deed purporting to convey the mortgaged premises to John Hansen, her husband, as his separate property; and thereafter he devised the same to Ellen E. Barlow, one of the defendants, who afterwards executed the promissory note, deed and mortgage in suit. It is alleged in the complaint, that Hannah Hansen claims that the above mentioned deeds were ineffectual to vest the title to the mortgaged premises in John Hansen in severalty, and that she is the owner of the undivided half thereof. The note and mortgage in suit were executed by Ellen E. Barlow alone, but her husband is made a defendant, and also Hannah Hansen. The defendants severally filed general demurrers to the complaint, the demurrers were overruled, and the plaintiff had judgment against Ellen E. Barlow for the amount due upon the note; and it was also ordered that the mortgaged premises be sold for the satisfaction of the amount due, and, if there should be a deficiency after the sale, that a judgment therefor be docketed against her. It was also adjudged, in the usual form, that the defendants claiming, etc., subsequent to the mortgage, be forever barred and foreclosed, etc.

Can a married woman make a promissory note and secure its payment by the execution of a mortgage of her separate real estate? It is provided by Section 158 of the Civil Code, that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried." The words, "*any engagement or transaction respecting property*" are sufficiently comprehensive to include a promissory note or mortgage; they may not be the most apt to express the legislative intent, but there is no room for doubt that it was

the intent to give married women the same power and capacity to contract that an unmarried woman possesses, subject to certain limitations and restrictions mentioned in the Code. Previous to the adoption of the Code, she could mortgage her real estate, provided the husband united in its execution, but under the Code, his signature is unnecessary. She was deprived of the capacity to make a contract for the payment of money by Section 167 of the Code as first adopted; but the section was repealed in 1874. The limitations and restrictions upon her capacity to contract, and the special provisions respecting the mode in which she was required to contract, as provided by the laws formerly in force, were designed not only for her protection in dealing with third persons, but also for her security against the improvidence, coercion, undue influence, or fraud, of her husband. But the Code has abrogated almost all of those limitations and restrictions, and has relieved her from the disabilities under which she formerly labored, and in respect to her property and contracts, has taken away the sort of supervision or control which the husband formerly exercised. The rents, issues and profits of her separate property becomes her separate property; and she may "convey her separate property" without the consent of her husband. (Sec. 162.) Her earnings are her separate property. (Secs. 168 and 169.) She and her husband may hold property as joint tenants, tenants in common, or as community property. (Sec. 161.) They may "alter their legal relations" as to property, and may, in writing, agree to an "immediate separation, and may make provision for the support of either of them and their children during such separation." (Sec. 159.) The property, in respect to which they may "alter their legal relations," would seem to include property held by them, as mentioned in Section 161—in joint tenancy, tenancy in common, and as community property, and perhaps such as is, or would become, the separate property of either. The "legal relations" which they occupy as to property, must include the ownership, possession, and the power to transfer, incumber and charge the property, present and future. In making

contracts altering their "legal relations" as to property, no other or different capacity is given to the husband than to the wife, nor is any different mode prescribed for the wife—except that the acknowledgment of her conveyance of real estate must be made as provided in Sections 1093 and 1191. The separate property of the husband is not liable for the debts of the wife contracted before marriage, (Sec. 170,) but her separate property is liable for her debts contracted before or after marriage. (Sec. 171.) She may sue or be sued alone, when the action concerns her separate property, or her claim or right to the homestead, or is between herself and husband; or when she is living separate and apart from her husband. (Sec. 370, *Code of Civil Procedure*.)

In *Wilson vs. Wilson*, (36 Cal., 447,) it was held that the wife could maintain an action against her husband upon a promissory note made before marriage. In view of the foregoing provisions of the Codes, and others that might be mentioned, tending to show the removal of the disabilities of coverture, it would seem beyond all question that the wife has competent power to make a promissory note, and execute a mortgage of her real estate to secure its payment. If she is under any disability in this respect, she has not the capacity of an unmarried woman in making contracts—or entering into engagements or transactions—respecting her property, as conferred upon her by Section 158. The making of promissory notes and the execution of mortgages are among the most common and ordinary contracts respecting property; and in view of the almost entire removal by the Codes of the common law disabilities incident to coverture, a married woman should not be denied the capacity to contract in that mode, unless the prohibition is clearly indicated by the Code. In my opinion, the defendant, Ellen E. Barlow, had competent capacity to execute the note and mortgage, and they are binding upon her and her interest in the mortgaged property. *Parry vs. Kelly*, (No. 5,489, October Term, 1877,) is clear authority to the point, that a married woman is as competent to execute a mortgage as a *femme sole*; and it was held that her mortgage of the community property was not void in the extreme sense.

Is the defendant, Ellen E. Barlew, liable to a personal judgment for the amount due upon the promissory note, and for the sale of the mortgaged premises, and for the deficiency that may remain after the sale? The answer of obvious. The usual responsibility upon the note and mortgage accompanies the power of their execution, there being nothing in the Code limiting the responsibility.

The remaining question discussed by counsel—Whether the husband and wife have power, by deeds through a trustee, or directly to each other, of portions of the community property, or by both of those modes, to vest the title of the respective portions in the grantee in severalty?—although from what has already been said, it may not be difficult of solution, cannot be authoritatively decided at this time, because it does not arise in the case. In an action to foreclose a mortgage, a title claimed adversely to the mortgagor cannot be litigated. (*Hitchcock vs. Clarke*, No. 4,810, Oct. Term, 1875.) The judgment, as rendered, does not affect the title alleged to be claimed by Hannah Hansen.

Judgment affirmed. Remittitur forthwith.

RHODES, J.

We concur:

CROCKETT, J.

McKINSTRY, J.

Supreme Court of the United States.

OCTOBER TERM, 1878.

JESSE D. CARR, APPELLANT,

vs.

THE UNITED STATES

- 1.—Where the city of San Francisco had conveyed certain lots within the city to the United States prior to the Van Ness ordinance; and another party claimed the lots under said ordinance: *Held*, that the previous conveyance to the United States was a bar to any claim under the ordinance.
- 2.—The United States filed a bill to quiet the title to certain lots in its possession in San Francisco; the defendant set up, by way of estoppel—certain judgments in ejectment rendered by the State courts at the suit

of his grantor, against certain officers of the government who, as its agents, had possession of the lots; in those actions the District Attorney, and additional counsel employed by the Secretary of the Treasury, appeared for the defendants, and the title was contested on the trial: *Held*, that these facts constituted no estoppel against the government, although, in California, a judgment in ejectment is, in ordinary cases, an estoppel both against the tenant in possession, and against the landlord who has notice of the suit.

- 3.—The United States cannot be estopped by proceedings against its tenants or agents; and cannot be sued without its consent; and such consent can only be given by act of Congress. No State can pass a law making the United States suable in its courts.
- 4.—Without an act of Congress, no direct proceedings will lie at the suit of an individual against the United States or its property; and no officer of the government can waive its privileges in this respect, nor lawfully consent that such a suit may be prosecuted so as to bind the government.
- 5.—The government can only hold possession of its property by means of its officers or agents; and to allow them to be dispossessed by suit, would enable parties always to compel the government to come into court and litigate its rights. Therefore, when it becomes apparent by the pleadings, or the proofs, that the possession assailed is the possession of the government by its agents, the jurisdiction of the court ought to cease; and its proceedings cannot be set up as an estoppel against the government.
- 6.—The cases in which the property of the government may be subjected to claims against it, are those in which the property is in juridical possession by the act of the government itself, or has become so without violating its possession, and it seeks the aid of the court to establish or reclaim its rights therein:—in such cases it is equitable that the prior rights of others to the same property should be adjudicated and allowed. The cases of *The Siren* and *The Davis*, (7th and 10th Wall.,) cited and approved.

Appeal from the Circuit Court of the United States for the District of California.

Mr. Justice BRADLEY delivered the opinion of the Court.

This case arises upon a bill to quiet title, filed by the United States against the appellant Carr, and various other persons, upon which a decree was rendered by the court below in favor of the plaintiff. Carr appealed from this decree. The controversy relates to certain lands at San Francisco, being two lots, each fifty varas square, on Rincon point, which are claimed by the government as having, with other adjoining

lands, been set apart and reserved for public use in 1847, and as having been conveyed to the United States by the city of San Francisco in 1852. The appellant claims the lots in question under one Thomas White, alleging that the said White occupied the same in 1849, and that he and his grantees continued to occupy the same until June, 1855, when the Van Ness ordinance was passed.

It is conceded that the premises in question were once pueblo lands, belonging to the municipality of San Francisco; but as such lands, until conveyed to private parties, were subject to the public uses of the government, both before and after the conquest of the country by the United States, it is evident that the government of the latter had the undoubted right to make such appropriation thereof for public use as it might see fit. It is denied, however, that any such appropriation was ever made by the proper authority. It appears from the pleadings and evidence in the case, that from the first occupation of San Francisco by the United States, in 1847, the military authorities of the government set apart Rincón Point (including the premises in question) for the use of the government; but that after the discovery of gold in 1849, the officers had much ado to keep them clear of trespassers, who entered upon, and endeavored to appropriate the same. In November, 1849, a lease of this tract, with others, was given by the officer in command at San Francisco, to one Thomas Shillaber, apparently for the purpose of keeping possession on behalf of the government. This lease was approved by the Secretary of the Interior. About 1852 a marine hospital was built by the government on the southeast half of the block on Rincon Point; bounded by Folsom, Harrison, Spear, and Maine streets. The whole block was 550 feet in length from Harrison to Folsom street, and 275 feet in width from Maine to Spear street. The southeast half was 275 feet square, forming four lots, each fifty varas, or $137\frac{1}{2}$ feet, square; numbered 1, 2, 3, and 4. Numbers 1 and 2 adjoined Harrison street; 3 and 4 adjoined 1 and 2. Lots 3 and 4 are the premises in controversy. The hospital building was actually constructed on lots 1 and 2, standing within

four or five feet of lots 3 and 4; and the latter were occupied by buildings or for yard room, as accessory to the hospital.

As before stated, however, different parties attempted to possess themselves of portions of the property, and amongst others White, under whom the appellant claims, made such an attempt in 1849, in reference to the whole block which includes the lots in question, but was ejected, as appears by the orders and correspondence set out in the complaint.

The consequence of White's attempt was, that adverse claims to the property under him were afterwards preferred from time to time. For the purpose of quieting these claims, when the hospital was being erected, a conveyance to the government was procured from the city authorities. On the 10th of December, 1852, the common council of the city passed a resolution that the Mayor be directed to convey to the United States all its right, title and interest to six fifty vara lots, bounded on the east by Spear street, on the south by Harrison street, on the west by Front street, and on the north by the beach. Which description includes the four lots above referred to. Such a conveyance was accordingly made by the Mayor by deed dated the 11th of December, 1852, and from thenceforward the United States claimed the property in question, as well by virtue of said deed, as by right of original appropriation for public uses.

The appellant, as before stated, claims the property by virtue of the Van Ness ordinance, passed June 20th, 1855, by which, amongst other things, the city of San Francisco did relinquish and grant all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, by themselves or tenants on or before the 1st day of January, A. D. 1855, provided such possession was continued up to the time of the introduction of this ordinance in the common council.—(15 Cal. Rep., 627.)

Now, it is too evident to require discussion, that the city of San Francisco could not, in 1855, make a valid grant of property which it had already granted in 1852; and which

the grantee (in this case the United States) constantly claimed as part and parcel of premises which were in its undoubted possession. The weight of the evidence in the case, is, that the government was in actual possession of lots 3 and 4 as appendant to the hospital, from 1852 to the passage of the ordinance. This would bring it within the terms of the ordinance itself. But we do not deem this material. It had a clear title from the city before, even if the action of the military authorities in 1847 and 1849 was not sufficient to effect an appropriation for public uses.

But the appellant relies on certain judgments rendered in the State courts in actions brought against the agents of the government having possession of the lands in question, which judgments he contends estop the government from claiming any title therein.

The first of these actions was an action for forcible entry and detainer, brought in a Justice's Court in December, 1857, by one Edward Barry against one McDuffie and one Palmer, for ejecting him (Barry) from lot No. 4, which lies on Main street. The defendants justified under an order of President Pierce, requiring the Marshal of the District of California to remove all persons trespassing on said lot. The County Court, to which the cause was appealed, found for the plaintiff, and reinstated him in the possession. The only question made in the case was, whether the justification was sufficient for ousting a person who was, in peaceable possession. This judgment would not have been decisive upon the title, even if the defendants themselves had been the true owners of the land, and had claimed to eject the plaintiff by virtue of said ownership.

The next action was an ejectment brought in the State District Court in February, 1865, by one Wakeman and others (under whom the appellant claims title) against one Hastings and others, to recover possession of the same lot No. 4. Defendants, besides the general issue, pleaded that the premises were the freehold of the United States, and that they, as its officers and employes, and by its authority, entered, etc. The question of title was gone into, and decided against the de-

fendants. A similar action of ejectment was brought in the same court in April, 1865, by one Volney Cushing (under whom the appellant also claims) against the said Hastings and others, to recover possession of the lot numbered 3, situated on Spear street. The defendants pleaded the general issue, and the Statute of Limitations. The title was also contested, in this case, and the judgment was for the plaintiff.

It is proved, that the person who was District Attorney of the United States for the District of California at the time when said actions were brought and tried, appeared as attorney for the defendants therein; and that Nathaniel Bennett, Esq., attended the trial of one of said causes as counsel for the defendants, being employed and paid by the Secretary of the United States; and, not being able to attend the trial of the other cause, he procured another person to attend in his place.

The appellant contends, that this was sufficient to make the United States a virtual party to said actions, and to conclude them by the judgment therein; that by the law of California, a judgment in ejectment is an estoppel; and that where a tenant, or other person in privity with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action; and to this point, the counsel of the appellant cited the cases of *Douglass vs. Fulda*, 45 Cal., 592; *Russell vs. Mallon*, 38 Cal., 263; and *Valentine vs. Mahoney*, 37 Cal., 389, as well as various cases decided in other States.

Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the government of the United States. We consider it to be a fundamental principle, that the government cannot be sued except by its own consent; and certainly, no State can pass a law, which would have any validity for making the government suable in its courts. It is conceded in the cases of *The Siren*, (in 7th Wallace, p. 152,) and in that of *The Davis*, (in 10 Wall., p. 15) that without an act of Congress, no direct pro-

ceeding can be instituted against the government or its property. And in the latter case it is justly observed, that "the possession of the government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with actual possession."—(10 Wall. 21.) If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a postoffice or a custom-house, a prison or a fortification.

In some cases, (perhaps it was so in the present case,) it might not be apparent until after suit brought that the possession attempted to be assailed was the possession of the government; but when this is made apparent by the pleadings, or the proofs, the jurisdiction of the court ought to cease. Otherwise, the government could always be compelled to come into court and litigate with private parties in defense of its property.

It may be contended, that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the District Attorney and additional counsel to aid in the defense. But we do not think any such inference can be legally deduced from the action of the Secretary of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive the rights of the government. And, in fact, he had no authority to waive those rights. In England it is usual, in the Admiralty Courts, in proceedings *in rem*, when it is made to appear that property of the government ought, in justice, to contribute to a general average, or to salvage, for the proper officer of the government to consent in court that it may take jurisdiction of the matter. As stated by this court, in *The Davis*, (10 Wall., 20,) "this consent is given by authority of the king, who thus submits to be sued in his own courts. The liberal exercise of this authority [there] removes the difficulty presented here, where no power to do this exists in any officer of the government, and prevents any apprehension of gross injustice in such cases in England."

The cases like those of *The Siren* and *The Davis*, already referred to, and many others therein cited, in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject-matter should be protected. *The Siren* was brought into the port of Boston, as prize, was libeled, condemned, and sold, and the proceeds paid into court. In distributing these proceeds among those who had claims against the vessel, an allowance was awarded for damages to the owner of another vessel which had been sunk by collision with the *Siren* during her voyage subsequent to the capture. It was held that, inasmuch as the United States had resorted to the aid of the court to procure the condemnation of the *Siren*, and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself, prior to that of the government, might well be satisfied out of such proceeds. At the same time, it was conceded that neither the government nor its property can be subjected to direct legal proceedings without its consent; and that whosoever would institute such proceedings must bring his case within the authority of some act of Congress. (7 Wall., 154.) *The Davis* and her cargo were seized for salvage services. Part of the cargo was cotton, belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a contract of affreightment. The government appeared as claimant, and it was held that the cotton, like other cargo, was justly liable to pay its proportion of the salvage services; the court, at the same time, as before stated, holding that even for salvage services the property of the government could not be taken out of its own possession by any direct proceeding.

Without discussing the matter further, we are clearly of opinion, that the judgments in the cases relied on by the appellant, constitute no estoppel against the United States. And being of opinion that the title of the United States to

the premises in question is undoubted, our conclusion is, that the decree of the Circuit Court must be affirmed.

No. 168.—OCTOBER TERM, 1878.

EDWARD HARRIS, ISAAC H. SHIMER AND LATITIA SHIMER, PLAINTIFFS IN ERROR.

VS.

JOHN MCGOVERN, FRANCIS R. BABY, AND CHARLES E. McLANE.

- 1.—The title of the city of San Francisco to the lands within the corporate limits of the city became absolute on July 1, 1864.
- 2.—Neither actual occupation, cultivation, nor residence is necessary to constitute legal possession if the continued claim of the party is evidenced by such public acts of ownership as the owner would exercise over property which he claimed in his own right and would not exercise over property which he did not claim.
- 3.—When a cause of action has accrued and the Statute of Limitations have commenced to run during the lifetime of the devisor of plaintiffs, the running is not interrupted by his subsequent decease, and the descent of the right of action to the plaintiff, though minors at the time, and under disability to sue.—[Error.]

Error to the Circuit Court of the United States for the District of California.

Mr. Justice CLIFFORD delivered the opinion of the Court.

Actual title to the lot in controversy is claimed by the plaintiffs as devisees and heirs of Stephen Harris, deceased, by virtue of an ordinance of the city, which, as they allege, was subsequently ratified by an act of Congress. Opposed to that the theory of the defendants is, that the city ordinance granted the lot to Stephen A. Harris, under whom they derive title, and that inasmuch as they have been in the open adverse possession of the same, claiming title, for more than five years, the title of the plaintiffs, if any they or their testator ever had, is barred by the Statute of Limitations.

Possession being in the defendants, the plaintiffs brought ejectment, and the defendants appeared and plead as follows: (1.) The general issue. (2.) That they were seized in fee-simple of the premises. (3.) That the title and right of possession of the plaintiffs were barred by the Statute of Limitations.

Pursuant to the act of Congress, the parties waived a jury and submitted the evidence to the court. Special findings were filed by the Judge presiding, with his conclusions of law, as exhibited in the record. Hearing was had, and the court rendered judgment in favor of the defendants, and the plaintiffs sued out the present writ of error.

Three errors are assigned, as follows: (1.) That the court erred in the conclusion of law, that the Statute of Limitations began to run as early as July 1, 1864, as found in their first conclusion of law. (2.) That the court erred in the conclusion, that the defendants were in possession of the premises for more than five years subsequent to the time when the Statute of Limitations commenced to run. (3.) That the court erred in their fourth conclusion of law, that the defendants were entitled to judgment.

Actions of the kind cannot be maintained in that State, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized, or possessed, of the premises in question within five years before the commencement of such action. (Stats. Cal., 1863, 326. 2 Code, Sec. 318.)

From the findings of the Circuit Court, it appears that the lot in controversy is within the corporate limits of the city, and that it is situated west of Larkin street, and northwest of Johnson street, as they existed prior to the passage of the ordinances, which were afterwards ratified by the act of the Legislature of the State. (Stats. Cal., 1858, 53.) Said land is also within the boundaries designating the lands to which the right and title of the United States were relinquished and granted to the city and its successors. (13 Stat. at Large, 333, Sec. 5.)

Prior to the incorporation of San Francisco, the locality was known as the pueblo, or town by that name, and the findings of the court show, that on September 25, 1848, the Alcalde of the pueblo made a grant in due form of the land in controversy to a party designated in the instrument by the name of Stephen A. Harris, which grant was duly recorded in the official book of records kept for that purpose; that at that date there was a man residing in that pueblo by the name of Stephen A. Harris, and another man by the name

of Stephen Harris ; that the grant was intended for, and delivered to the latter, and not to Stephen A. Harris, and that Stephen Harris, to whom the grant was delivered, acquired all the title that passed, or was conveyed by the grant of the Alcalde. It also appears, that Stephen Harris, two years later, left California, and that he never returned to that State ; that he went to New Jersey, where he remained several years, and then removed to Illinois, where, on the fifth of November, 1867, he died, leaving a will, by which he devised his property, including the land in controversy, to the plaintiffs, who are his children.

By the fifth finding of the court, it appears that there was no evidence introduced tending to show that the deceased, or the plaintiffs, or any person claiming through or under them, ever improved the land, or was ever in actual possession or occupation of the land, or any part of the same. On the other hand, it appears that Stephen A. Harris, May 1, 1854, conveyed the land to the person named in the sixth finding, by deed in due form, which was duly recorded, and that all the right, title, and interest thus acquired by the grantee by sundry mesne conveyances subsequently vested in the defendants for a valuable consideration, without notice of the claim of the plaintiffs or their testator.

There was no evidence to show that any party was in actual occupation of the land January 1, 1855, or at any time between that date and the first day of July of the same year, but the seventh finding of the court shows, that one of the grantors of the defendants, in the spring of 1864, took actual possession of the land, claiming title under one of the said mesne conveyances, and that he fenced and occupied the lands, and that he and his several grantees, including the defendants, have since that time to the present been in the actual, peaceable, open, continuous, exclusive, and adverse possession of the land, claiming title thereto, in good faith against all the world, under the said several mesne conveyances.

Section 5 of the act of Congress of July 1, 1864, relinquished to the city all the right and title of the United States to the lands within the corporate limits of the city, as

defined in the act of incorporation, passed by the State Legislature, and of course, the title of the city to those lands became absolute on that day. (*Lynch vs. Bernal*, 9 Wall., 323; *Montgomery vs. Bevans*, 1 Sawyer, 677; 13 Stat. at Large, 333.)

Infancy is not set up in this case, and if it were, it could not avail the plaintiffs, as the ninth finding of the court shows that the minor plaintiffs arrived at full age more than a year before the suit was commenced.

Lands lying west of Larkin street, and southwest of Johnson street, were relinquished to the possessors, subject to the right of the city to take possession of the same, if wanted for public purposes, without compensation, but the lot in controversy is not within that reservation, as the first finding of the court shows that it is situated northwest of Johnson street.

Appended to the findings of fact are the conclusions of law pronounced by the Circuit Court. They are as follows: (1.) That the adverse possession of the grantors of the defendants commenced in the spring of 1864, and that the Statute of Limitations began to run as early at least as the first day of July of that year, when the title of the city to the municipal lands within its boundaries became perfect under the act of Congress, to which reference has already been made.

Authorities to show that the facts stated in the seventh finding of the court amount to an adverse possession of the lot in controversy, within the meaning of the State statute, are quite unnecessary, as the proposition is too plain for argument. (*Angel on Limitations*, 6th ed., Sec. 394; *Green vs. Lister*, 8 Cranch, 249.)

Cases frequently arise where the property is so situated as not to admit of use or residence. In such cases neither actual occupation, cultivation, nor residence are absolutely necessary to constitute legal possession, if the continued claim of the party is evidenced by such public acts of ownership as the owner would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. (*Ewing vs. Burnet*, 11 Pet., 53.; *Jackson vs. Howe*, 14 Johns., 405; *Arrington vs. Liscom*, 34 Cal., 365; *Kennebec Purchase vs. Skinner*, 4 Mass., 416.)

Apply the rule to the case which the foregoing authorities establish, and it is clear, that the first conclusion of law adopted by the Circuit Court is correct, as the seventh finding of facts shows that the defendants, from the date of the act of Congress confirming the title of the city to her municipal land to the date of the judgment, were in the actual, peaceable, open, continuous, exclusive, and adverse possession of the land, claiming title thereto in good faith against all the world, which is certainly a bar to the plaintiffs' right of action under the statute of the State.

Nor is there any valid objection to the second conclusion of law adopted by the Circuit Court, which was, that the cause of action having accrued, and the Statute of Limitations having commenced to run during the lifetime of the devisor of the plaintiffs, the running of the statute was not interrupted by his subsequent decease, and the descent of the right of action to the plaintiffs, though minors at the time, and under disability to sue.

Decided cases of a standard character support that proposition, and the court is of the opinion that it is correct. (*Collden vs. Moore*, 13 Johns., 513; *Livingston vs. Robins*, 15 Id., 169; *Same case*, 16 Id., 537; *Fleming vs. Griswold*, 3 Hill, 85; *Becker vs. Van Valkenburg*, 29 Barb., 319.)

When the statute once begins to run, says Angel, it will continue to run without being impeded by any subsequent disability. (*Smith vs. Clark*, 1 Wilson, 134; *Angel on Limitations*, 6th ed., Sec. 477; *Currier vs. Gale*, 3 Allen, 328; *Durouse vs. Jones*, 4 Term, 301; *Jackson vs. Carson*, 2 Johns., 301; *Same vs. Wheat*, 18 Id., 40; *Walker vs. Gratz*, 1 Wheat, 295.)

Decisive support to the third conclusion of the Circuit Court is also derived from the authorities cited to sustain the second. Continuous adverse possession of the land, say the court in their third conclusion, having been held by the defendants and their grantors for a period of more than five years subsequent to the time when the statute began to run and before the action was commenced, the action is barred, as there was no disability to sue when the cause of action first accrued.

Suppose that is so, then clearly, the defendants were entitled to judgment, and there is no error in the record.

Judgment affirmed.

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No. 5.

Current Topics.

THE case of *Burroughs vs. Strader*, (unwritten opinion,) decided by our Supreme Court, as prepared by us for our appendix of unwritten opinions, and published in the "Bulletin" of March 19, shows an argument by appellant upon two points raised by the record, to wit: 1. That the writ of attachment was defective, because it did not provide for attorney's fees. 2. That the affidavit was defective, because in the alternative. The affidavit was in these words: "That the payment thereof has not been secured by any mortgage or lien upon real or personal property, or if originally so secured, that such security has without any act of plaintiff's become valueless." This case has become very important and many inquiries made of us concerning the point actually decided by the Court. We have ascertained that the Supreme Court only considered the defect in the affidavit and reversed the case upon that point. They did not consider or pass upon the alleged defect in the writ. The Court has now entered an order directing the Phonographic Reporter of the Court to give us copies of such of the unwritten opinions as may be reversed, that we may give to the profession the exact point decided. It will thus be seen that we are adding more valuable features to the JOURNAL with each volume.

WE publish in this issue an opinion by the Supreme Court of the United States declaring the exact measurement of Mexican leagues and varas. The point urged by Mr. Dwinelle in his brief for the city in the matter of the extent and size of the

pueblo to which the city of San Francisco succeeded, is, we think, practically settled by this decision. Mr. Dwinelle contends, however, that inasmuch as the decree confirming the city's interest in these lands and designating the boundaries was written in English, the four leagues spoken of in the decree are English leagues, and not Mexican leagues. The opinion will be read with interest, and may prove an authority upon the litigated point.

JOHN M. COGHLAN, Esq., of the law firm of Coghlan & McClure, of this city, died at his residence in Oakland on the 26th instant. Mr. Coghlan was a member of Congress from the Third District of this State, and afterwards succeeded Hon. Walter Van Dyke, United States District Attorney. He was in active practice at the time of his death, and the firm of which he was a member, had already built up a lucrative business. Appropriate resolutions were passed by the Bar association, and the courts adjourned in respect to his memory.

THE following Rule of the United States Circuit Court for the District of California has been adopted :

Rule 79. Whenever the proper proceedings have been perfected in a State court, to remove a case from such court to this court, pursuant to any statute of the United States, either party may at any time thereafter, of course, file the transcript required by law, in this court, and serve written notice of such filing upon the adverse party or his attorney ; and upon filing in this court satisfactory evidence of the service of such notice, the clerk shall enter the action upon his register, and thenceforth the provisions of Rule 78 of this court shall be applicable thereto ; and the same proceedings may be hereafter had as if the transcript had been filed by the party removing the case at the time prescribed by law.

Ordered, that the foregoing rule be, and the same is hereby, adopted as Rule 79 of this court ; that said rule take effect and be in force from and after the fifteenth day of April, A. D. 1879.

Adopted March 24, 1879.

Supreme Court of California.

JANUARY TERM, 1879.

[No. 10,397.]

[Filed March 24, 1879.]

EX PARTE McCARTY, ON HABEAS CORPUS.

A grand jury has power to find an indictment for the offense described in Section 417 of the Penal Code, which section is as follows:

"Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner, or who, in any manner, unlawfully uses the same, in any fight, or quarrel, is guilty of a misdemeanor."

The County Court has jurisdiction to try such indictment.

Appeal from the County Court of Stanislaus county.

C. C. Wright, District Attorney, for People.

R. B. Treat, Attorney for McCarty.

McKINSTRY, J., delivered the opinion.

It is not necessary in this case to define the terms "capital or other infamous crime," employed in Section 8, of Article I of the Constitution of the State. (Art. I, Sec. 8.)

It may be admitted, that "exhibiting a deadly weapon in a rude, angry and threatening manner," is not an "infamous crime," which can be prosecuted only by presentment or indictment by a grand jury.

The Constitution provides, that the County Courts shall have "such criminal jurisdiction as the Legislature may prescribe;" (Art. VI, Sec. 8;) and that the Legislature shall "fix by law the powers, duties and responsibilities" of Justices of the Peace: "provided, such powers shall not, in any case, trench upon the jurisdiction of the several courts of record." (Art. 6, Sec. 9.)

The statute provides: "Every public offense must be prosecuted by indictment, except (after other enumerated exceptions) offenses tried in Justices' and Police Courts. (*Penal Code*, Sec. 682.)

Neither the Constitution (Art. I, Sec. 8,) nor the section of the Penal Code last cited, prohibits the prosecution by indictment of any criminal offense.

And the Code of Civil Procedure (Sec. 85) declares that

the jurisdiction of the County Courts shall extend—"To inquire, by the intervention of a grand jury, of all public offenses committed or triable in the county, and to the trial of all indictments, except for treason, misprision of treason, murder and manslaughter."

Under this section of the Code of Civil Procedure, (which in nowise conflicts with any provision of the Constitution,) the grand jury had power to indict the petitioner for the crime with which he was charged, although it be not an infamous crime, and the County Court had jurisdiction to try the indictment.

The question which remains is: Has Section 85 of the Code of Civil Procedure been repealed? .

It is not claimed that the section has been expressly repealed, but that as Section 117 of the same Code is found later in the statute than Section 85, the former is the last expression of the Legislative will, and must be held to have repealed anything in the latter which may conflict with it.

Section 117 gives jurisdiction to the Justices' Courts of all misdemeanors punishable by fine not exceeding \$500, or imprisonment not exceeding six months, or by both such fine and imprisonment. "Exhibiting a deadly weapon," etc., is one of those misdemeanors, and Section 117 of the Code of Civil Procedure therefore confers the jurisdiction to try that offense upon Justices of the Peace.

We have failed, however, to discover anything in the Constitution which renders the jurisdiction to try a defendant for the offense named exclusive in the Justices' Courts. The difference is, that he can be tried in the County Court only after indictment.

If we again refer to the powers of the two courts as spoken of in the Constitution, we find that the County Court may assume all criminal jurisdiction prescribed by the Legislature, and that the Justice of the Peace may exercise all jurisdiction conferred, or sought to be conferred, by the Legislature, provided it shall not trench upon the jurisdiction of the County Court—or any other court of record. The limitation as to not trenching upon the jurisdiction of

the County Court relates either to the jurisdiction of the County Court, as defined in the Constitution, or as described in the Statute. If it refers to the jurisdiction as described in the Statute, it is manifest, that as the 85th Section of the Code of Civil Procedure had conferred on the County Court the jurisdiction, by grand jury, to indict for all offenses and to try all indictments, none of this jurisdiction could at the same time, or subsequently, be given to the Justice of the Peace without "trenching" upon the jurisdiction of the County Court. If, however, the phrase in Section 9, Article VI, of the Constitution, only prohibits the Legislature from conferring on the Justices of the Peace any of the jurisdiction expressly and specifically conferred on the County Court by the terms of the Constitution—as distinguishable from that which the Legislature is permitted to give to that Court—then, there is nothing in the Constitution which prohibits the Legislature from placing within the jurisdiction of both the County and Justices' Court the trial of criminal offenses, which are not necessarily indictable under the Constitution, but which are made indictable by law.

Petitioner remanded.

We concur :

CROCKETT, J.

RHODES, J.

[No. 5,831.]

[Filed March 24, 1879.]

CLARK, PLAINTIFF AND RESPONDENT,

VS.

PORTER, DEFENDANT AND APPELLANT:

In an action brought on a street assessment, in which it is admitted by the pleadings that several defendants are the owners of the lot, it is erroneous to order judgment for the amount of the assessment against only one of the defendants.

Appeal from the Third District Court, City and County of San Francisco.

Wm. Leviston, Attorney for Appellant.

J. C. Bates, Attorney for Respondent.

RHODES, J., delivered the opinion of the Court.

Action to recover a street assessment. It is alleged in the

complaint that defendant Porter and several other persons who are made defendants, are the owners of the lot charged with the lien of the assessment; and the allegation is not denied by the answer of the defendant Porter. At the hearing the plaintiff, against the objection of Porter, dismissed the action as to all of the defendants, except Porter, and the Court gave judgment against Porter alone, without any amendment of the complaint. This was error. The thirteenth Section of the Act, as amended in 1870, (*Stats.* p. 898,) provides that the action shall be brought "against the owners, and all persons having an interest" in the property sought to be charged. (See *San Francisco vs. Doe*, 48 Cal., 560.) It was not contemplated by the statute that the interest of only one, or of any number less than all, of the joint owners of the property should be subjected to sale for the satisfaction of the lien of the assessment.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

We concur:

WALLACE, C. J.

MCKINSTRY, J.

CROCKETT, J.

[No. 10,383.)

[Filed March 27, 1879.]

PEOPLE vs. CASEY.

In a prosecution for murder, where there was evidence tending to show the previous good reputation of the defendant as a quiet and peaceable citizen, an instruction to the jury in the following words, given on the request of the prosecution, was erroneous, viz: "No inference can be drawn by a jury of the intention which induced the commission of the offense, from the previous character of the prisoner. His intention can only be determined by his acts. The law will imply a malicious intention."

Appeal from the Sixteenth District Court, county of Mono.
George N. Whitman, District Attorney, for the People.

Frank Owen and *John A. McQuaid*, Attorneys for Casey.

CROCKETT, J., delivered the opinion.

In a criminal prosecution, if there be a question at the

trial whether the defendant committed the act imputed to him by the indictment, evidence of his previous good reputation, in respect to the particular trait involved in the inquiry, is admissible for the defense ; and such reputation, if established, is one of the facts to be considered by the jury in connection with the other facts, in arriving at a conclusion whether the defendant did or did not commit the act. The weight to which the proof of the previous good reputation of the accused is entitled, is a matter for the jury, to be considered in connection with the other facts proved. (*People vs. Ashe*, 44 Cal., 288.)

In the case at bar, the defendant was indicted for murder, and at the trial, while on the stand as a witness in his own behalf, admitted the fact of the homicide and gave his version of the circumstances under which it occurred ; and if his statement of the transaction was true, it tended to prove that the killing occurred in a sudden affray, in which the deceased struck the first blow, and the fatal wound was given with a pocket knife, used in the heat of passion, and without premeditation or malice. No other witness was present at the commencement of the affray, and when first seen by the other witnesses, the parties were on the ground, the deceased on top, with his fingers clenched in the defendant's beard ; and when approached by the witnesses, he said the defendant had murdered him, and immediately fell over on his side and expired without speaking further. At the trial, a witness was called for the defense, who testified, without objection, that he had known the defendant since 1870, "and that during that time his character has always been that of a quiet, peaceable citizen ; I never knew of his having any other difficulty." This was not the most satisfactory method of proving a previous good reputation ; but as the evidence was admitted without objection, the jury was authorized to consider it, as tending, in some degree, to establish the good reputation of the defendant for peace and quietness. On these facts the Court, at the request of the prosecution, charged the jury, that "no inference can be drawn by a jury of the intention which induced the commission of the offense, from the previous

character of the prisoner. His intention can only be determined by his acts. The law will imply a malicious intention."

While it is true, that in a prosecution for murder, if the killing by the defendant be admitted or proved, the law will presume malice, unless the contrary is made to appear; it is equally true, that this presumption may be rebutted. It may appear from the evidence for the prosecution, that the killing was not premeditated or malicious, but was justifiable, excusable, or done in the heat of passion on a reasonable provocation. But if it does not so appear from the evidence for the prosecution, the defendant will have the right to rebut the presumption of malice, by any competent evidence which tends to prove that the homicide was justifiable, excusable, or done in the heat of passion. One of the facts on which he may rely, as tending, in a greater or less degree, according to the circumstances of each particular case, to rebut the presumption of malice, is a previous good reputation. In some cases, when considered in connection with other facts, it may be entitled to little or no weight; while in others, it may deserve the gravest consideration. That is a question for the jury; but it is nevertheless a question they are entitled to consider, in connection with other facts proved, in deciding upon the intent with which the act was done.

The effect of the instruction was to take from the jury the consideration of the evidence in respect to the previous reputation of the defendant in determining the question of intent; and was erroneous for the reasons above indicated.

Judgment and order reversed, and cause remanded for a new trial.

Remittitur forthwith.

We concur:

WALLACE, C. J.

RHODES, J.

NILES, J.

McKINSTRY, J.

Supreme Court of the United States.

OCTOBER TERM, 1878.

**JOHN FOSTER, MICHAEL KASWORSKY, NARCISSE
GUINCOCHIA, SALVADOR MENDEZ, PEDRO SER-
DUGO, JOHN WHITE, RICHARD BLACK ET AL.,
PLAINTIFFS IN ERROR.**

VS.

FRANCIS MORA.

In actions of ejectment in the United States Courts the strict legal title prevails.

If there are equities which would show the right to be in another, these can only be considered on the equity side of the federal courts.—[EDITOR LAW JOURNAL.]

In error to the Circuit Court of the United States for the District of California.

Mr. Justice MILLER delivered the opinion of the court.

This is an action of ejectment brought originally in the Circuit Court for the District of California, by the defendant in error, in which he recovered judgment against the plaintiffs in error.

The parties waived a jury, and the court made a finding of facts on which its judgment was rendered. Those which set out plaintiffs' title are as follows :

"1. The lands in controversy are the ancient mission buildings and quadrangle, and the gardens and the orchards of the ancient Mission of San Juan Capistrano, as formerly occupied by the priests of the mission ; area, forty-six acres and seventy-four hundredths of an acre (46.74-100.)

"2. That on the 19th day of February, A. D. 1853, Joseph S. Alemany, Roman Catholic Bishop of Monterey, filed with the Board of Commissioners to ascertain and settle private land claims in California, appointed under the act of Congress of March 3, 1851, his petition, in writing, a copy of which (omitting the description of the several parcels of land herein described and claimed,) is hereto annexed and made part hereof, and marked 'Schedule A,' and thereupon such proceedings were had before the said board ; that the said board, on the 18th of December, A. D. 1855, made a decree confirming to said petitioner the lands described in

his petition, to be held by him for the uses and purposes in said petition described. A copy of the decree (omitting the description of the several parcels of land,) is hereto annexed and made part hereof, marked 'Schedule B;' that afterward the United States appealed from the said decree to the District Court of the United States for the Southern District of the State of California, and thereafter the Attorney General of the United States, having given notice that he would not prosecute such appeal, the same was thereupon afterward, on the 15th of March, A. D. 1858, at a regular term of the said court, by its order duly entered, dismissed, and the said Joseph S. Alemany, Bishop as aforesaid, was adjudged and decreed to have leave to proceed in the premises under the decree of the Land Commissioners as under final decree.

"3. That on the 18th day of March, A. D. 1865, letters patent were duly issued by the United States of America to the said Reverend Joseph S. Alemany, Bishop aforesaid, a copy whereof is annexed, and made a part hereof, marked 'Schedule C.'

"4. Afterward and before the commencement of this suit, the title of the said Joseph S. Alemany, Roman Catholic Bishop, as aforesaid, to the said premises became vested in the plaintiff herein, and that they are the same premises described in the complaint and here in controversy."

It also appears that this land had been in possession of the mission ever since the year 1796.

The defendants were admitted to be in possession at the commencement of the action, and their claim of title is in substance founded on these facts, as stated by the court:

A grant by Pio Pico, Governor of California, of the premises in controversy, dated December 6, 1845, a petition to the Board of Commissioners of private land claims, dated October 23, 1852, a decree of confirmation of that board, dated July 7, 1855, an appeal which was dismissed, and a survey of lands so confirmed by the Surveyor General of the United States.

No patent has been issued to the claimants under these proceedings.

It thus appears, that the plaintiff has the only title founded on a patent from the United States. The act of Congress of 1857, to ascertain and settle the private land claims in California, required that every claim to land arising under the Mexican government should be presented to the Board of Commissioners appointed under it, and that they should reject or affirm the claim.

It also contemplated, as the final evidence of title, that a patent should issue to the claimant or his representatives when the claim was established, in whole or in part. This patent is declared by the statute to be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

The patent to Bishop Alemany in this case, and in this action, is conclusive as against the United States, that the Bishop had a meritorious claim derived from the Mexican government to the land in question, and that the United States conveys to him the legal title to the land.

In actions of ejectment in the United States Courts, the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the federal courts.

This record shows, that plaintiff holds the only legal title which the courts of the United States can recognize. The oldest claim, the oldest possession, the oldest legal title, and the only patent from the United States, are with the plaintiff, and in this action these must prevail.

We are invited by plaintiffs in error into the discussion of the canon and civil laws of Mexico, concerning the titles to lands held by missions and other ecclesiastical bodies. We must decline to follow this lead.

If there is any equitable reason why the only strict legal title and the older Mexican claim and possession should not prevail, it is not available in a court of law.

The judgment of the Circuit Court is affirmed.

[No. 143.]

THE UNITED STATES, APPELLANT,

VS.

EVELINA PEROT, WIFE OF JOHN ASKEW ET AL.

Spanish grants made in Texas for lands in the "Neutral Grounds," east of the Sabine, from 1790 to 1800, are valid.

The Mexican league, as used in Texas, and applicable to Spanish grants in the Neutral Ground, has always been estimated at 4,428.4 acres; being a square of 5,000 varas on each side, and the vara being considered $33\frac{1}{4}$ American inches; and grants of leagues in the Neutral Ground should be estimated at that rate.

The true Mexican vara is slightly less than 33 American inches, but by use in California it is estimated at 33 inches, and in Texas at $33\frac{1}{4}$ inches.

The common usage of any country in reference to its measures should be followed in estimating such measures when referred to in grants made there.

The courts of the United States take judicial notice of the laws which formerly prevailed in countries acquired by the United States, up to the time of such acquisition. As to such countries, they are not deemed foreign laws, but the laws of an antecedent government.

Appeal from the District Court of the United States for the District of Louisiana.

Mr. Justice BRADLEY delivered the opinion of the court.

The claim in this case is for four leagues of land granted by Bernardo Fernandez, commandant of the post of Nacogdoches, under the Spanish government, in the Province of Texas, to Pedro Dolet, on the 27th of December, 1795, and extended in possession on the 14th of January, 1796. The land was situated on the bayou of the Adoise, in the settlement of Bayon Pierre, and in what is known as the Neutral Ground, lying east of the Sabine river, and west of the arroyo Hondo, the Kisachey and the Calcasieu. This territory was then claimed as belonging to Texas, and was occupied and settled by the Spanish authorities of that province, though claimed by the Province of Louisiana—the Spanish settlements in Texas having been pushed forward easterly toward the Sabine. After the cession of Louisiana to the United States, it became a subject of dispute between our government and Spain, and the Sabine was finally acquiesced in as the boundary line. But as Spain owned both provinces at the time of this grant, there can be no question as to its validity. Such a grant for a large tract of over 200,000 acres

of land in the same district was confirmed by this court in the case of the United States vs. Davenport's heirs, (15 How., 1.) The grant in that case was made in the same year as the grant in this case, 1795. The court, by Justice Campbell, said : "The land comprehended in these grants, at their respective dates, was within the unquestioned dominion of the crown of Spain. The evidence clearly established, that the commandants of the posts at Nacogdoches, before and subsequently, were accustomed to make concessions to lands in the neutral territory. This was not at all times an unquestioned jurisdiction, but between the years 1790 and 1800, it seems to have been generally acquiesced in."

We think, therefore, that the grant must be sustained. The evidence produced to authenticate it is, under the circumstances, all that the claimants could be expected to produce.

But the grant is for four leagues only. The claimants obtained a decree below for four American or English leagues ; and such leagues may have been inadvertently allowed in some previous case. But it is evident, that no such leagues were in the minds of the parties. The leagues intended were Spanish leagues, such as were used in land measures and grants in Mexico and Texas at that period. Now, we are bound to take judicial notice, that the Mexican league was not the same as the American league. The laws of Mexico, of force in Texas, previous to the Texan revolution, were the laws not of a foreign, but of an antecedent government, to which the government of the United States, through the medium of the Republic of Texas, is the direct successor. Its laws are not deemed foreign laws ; for, as to that portion of our territory, they are domestic laws ; and take judicial notice of them. (*Fremont vs. U. S.*, 17 How., 542—557.)

If any doubt existed as to the extent of the Mexican league, an inquiry might be necessary to ascertain it. But no such doubt exists. The old legal league by the laws of Spain, and which was adopted in Mexico, consisted of 5,000 varas ; and a vara in Texas has always been regarded as equivalent to $33\frac{1}{2}$ English inches ; making the league equal to a little more than 2.63 miles, and the square league equal to 4.428 4-10 acres. This is perfectly well understood in Texas, where

controversies respecting Spanish titles are constantly brought before the courts.

Strictly speaking, the standard vara of Mexico is somewhat less than $33\frac{1}{2}$ inches. Our engineers, at the close of the Mexican war, brought back with them a copy of that standard found in the Mexican archives, being one of a set prepared for distribution among the Mexican States. This standard is still preserved in the Coast Survey office, and by careful comparison with our standards, by Professor Bache, was found to be only 32.9682 inches. This agrees very closely with the public reports of the government of Mexico on the subject, which makes their vara 838 millimetres, which are equivalent to 32.9927 inches. Humboldt, in 1803, found it to be 839.16 millimetres, or a slight fraction over 33 inches. But it seems that a vara measure of somewhat larger dimensions obtained in Texas from an early period, and the result is, what has been stated above, $33\frac{1}{2}$ inches to the vara, and 4.428.4 acres to the league. The cordel, a cord of 50 varas, or about $137\frac{1}{2}$ feet in length. was the instrument generally used in measuring large tracts, one hundred of these making a league; and it is probable that the cordel originally employed in Texas had become somewhat lengthened by use. (See *The Constitution and Laws of the Republic of Mexico and of the States of Coahuila and Texas*, N. York, 1832; also, *Yoakum's History of Texas*, vol. 1., p. 217; *Rockwell's Spanish and Mexican Laws*, p. 664; *Halleck's Report*, Ex. Doc. No. 17, Ho. Rep., 1st Sess. 31st Cong., p. 145.)

The standard Mexican vara is so near to 33 inches, (wanting, according to the best measurements, less than the hundredth of an inch of that quantity,) that a standard vara measure laid on an American yard would so nearly correspond with 33 inches, that the difference could not be perceived by the naked eye. Hence, in California, after its acquisition by the United States, a vara came to be considered as exactly equal to 33 inches; and this result was sanctioned by the General Land Office as early as 1852. The United States Surveyor General of California, in a report to the Land Office, dated at San Francisco, November 14, 1851,

said: "All the grants, etc., of lots or lands in California, made either by the Spanish government or that of Mexico, refer to the 'vara' of Mexico as the measure of length. By common consent here, that measure is considered as being exactly equivalent to *thirty-three* American inches." He then refers to other estimates found in a recent publication, and adds: "It is important that the relative proportions of their measure should be clearly settled. I, therefore, have to ask the aid of the department in doing so." The Commissioner, in answer to this letter, dated Washington, March 5, 1852, said: "You state, that by common consent, it (the Mexican vara) is considered in California as exactly equivalent to 33 American inches. I can see no reason why there should be any departure from this ratio, and agree with you, that any important change in the length of the 'vara' recognized and acted upon in California, would produce confusion."

It is understood, that the department has always, since that time, acted upon this standard of value of the vara in respect to surveys in California; which makes the square league, of 5,000 varas to the side, equivalent to 4,340.278 acres. In a letter addressed to Mr. Wilson, Commissioner of the General Land Office, to the late Mr. Justice Catron, of this court, on the 20th of February, 1855, he says that the practice of the Land Office is to consider and allow the vara in California as equivalent to 33 inches, and the league as equivalent to 4,340.27 acres.

It is important that the uniform practice and usage of a country should be observed in the construction of all grants made therein while such usage prevailed.

For this reason, we think, that in Texas, and in relation to grants emanating from the Mexican government in that province, before its separation from the parent State, the vara and league recognized in land measures there, should be respected.

Allowing the claimant, therefore, at the rate of 4,428.4 acres to the league, according to the rate above referred to, he is entitled to a decree for 17,713 6-10 acres, instead of 23,040, as decreed by the court below, requiring a deduction

of 5,326 4-10 acres. If the claimant will remit this excess, he will be entitled to an affirmance of the decree for the balance, namely, for 17,713 6-10.

On filing such remitter, let a decree be entered accordingly.

[NOTE.—The following table shows the different values given to the Mexican vara and league by different measurements and authorities :

AUTHORITY.	1 MEXICAN VARA.		1 League = Miles.	1 Sq. League = Acres.
	=Miles.	=Inches.		
Humboldt (1803).....	^m 0.839,16	33.03839	2.6071966	4350,384
Mexican Decree (1839).....	.838,01	32.99311	2.6036236	4338,464
Orbegozo (1844?).....	.838,00	32.99272	2.6035924	4338,363
U. S. Coast Survey (1850)...	.837,377	32.96820	2.6016572	4331,917
Bustamante (1851).....	.837,33	32.96634	2.6015112	4331,430
Use in California.....		33.00000	2.6041667	4340.277
Use in Texas.....		33.33333	2.6304714	4428,402

SUPREME COURT OF TEXAS.

DECEMBER TERM, 1878.

STEELE vs. RENN.

An innocent purchaser from a devisee under a forged will take a valid title.

Appeal from Cherokee county.

MOORE, C. J., delivered the opinion of the court.

This is an action of trespass to try title, brought by appellees, December 12, 1872, for the recovery from appellants of lots 3 and 4, in block 23, in the town of Rusk, Cherokee county, to which both parties claimed title under Casper Renn, deceased, in whom the title is admitted to have been at the time of his death. Appellees claim as the heirs, and appellants as purchasers in good faith from H. K. Joyce and wife, who claimed as devisees of Renn.

On the 23d of December, 1864, Casper Renn died in Rusk, Cherokee county, where he had for some years previously resided. In January, 1865, an instrument purporting to be his last will and testament was presented to the court for probate by the parties therein named as executors. Said instrument authorized said executors to administer and

settle up the estate in accordance with its terms, without being subject to the supervision and control of the court. After due notice of application had been given the execution of the instrument, as required of by the court, whereupon it was adjudged to be the last will and testament of said Casper Renn, deceased, and the property and effects belonging to his estate, were committed to said parties, named as executors, to be by them administered under and in pursuance of the authority purported to be given them therein.

On March 3d, 1865, said executors made and delivered to said Joyce and wife a deed for said lots, devised to them by said will. And on the 2d of December, 1865, said Joyce and wife, in consideration of \$275 paid them by Richard G. Steele, as recited in their deed, sold and conveyed them to said Steele, from whom they were subsequently purchased by appellant, Carter.

Appellees, who are brothers and sister of said Casper Renn, deceased, were, at the date of his death, and most of them seem to be still, citizens of Germany. Some time in the summer of 1865, B. Renn, one of the appellees, came to Rusk, Cherokee county, where he has since resided, to look after the estate of his brother, on behalf of his brothers and sister, as well as himself. And in November, 1866, prior to the sale of the lots from Steele to Carter, suit was instituted by said B. Renn, in the name of the brothers and sister, heirs of said Casper Renn, deceased, to set aside and revoke the probate of said will, charging the same to be a false and spurious instrument, and not, in fact, the will of said Casper Renn, deceased. And in 1873, it was finally so determined and adjudged by this Court, and its probate ordered to be revoked and annulled.

On the trial the facts here stated having been proved, appellants introduced evidence tending to prove that they purchased the lots in good faith, and claimed to be entitled to the protection of the Court as purchasers for value, without notice that said instrument was not the true and genuine will of Casper Renn, deceased, as it purported and had been adjudged to be by its probate. Whereupon, the Court in-

structed the jury, among other things, as follows: "The plaintiffs have produced in evidence a conclusive judgment, setting aside the pretended will of Casper Renn, deceased, and declaring it null and void, and that his heirs, at his death, were invested with the ownership of all of his estate. When Steele purchased from Joyce he took no better title than Joyce had, which has been shown to be none at all, and he took the title at his own risk."

If this is a correct view of the law, evidently appellants have no title, and have no just cause to complain of the recovery of the lots by appellees. On the other hand, if it is erroneous, as it necessarily controlled the verdict of the jury to the prejudice of appellants, the judgment must be reversed.

The practical importance of the question raised by this charge is obvious. If the views of the Court are held to be correct, no title derived from a devisee but may be swept from under the purchaser at any time, however remote, while the probate of the will is subject to attack. This fact, when known, must cast a cloud on all such titles, lessen their market value and retard their transfer. On the other hand, if the instruction does not correctly state the law, our probate system affords but slight safeguards to non-resident heirs against perjury and fraud. These considerations induced this Court to refrain from its decision of this case for several terms, and call upon the counsel for a more thorough examination of the law applicable to it than had at first been made by them. But we regret to say, that so far they have cited us to no case bearing directly upon the point presented, and we have, to a considerable extent, to decide it as an original question.

Appellants insist that they are entitled to protection as innocent purchasers, notwithstanding the invalidity of the will from which their title springs. In support of their proposition they refer us to the case of *Jones vs. Powers*, 10 Eng. Ch. Rep., 310; 3 Myl. & K. 581. But this case merely illustrates the rule of equity, protecting purchasers in good faith, who get in the outstanding legal title, but leaves unsettled the main difficulty, viz: Although he may have pur-

chased in good faith, did Steele occupy a better position than Joyce and wife would if they had not sold the lots? Unquestionably their title in such event would have fallen with the revocation of the probate of the instrument by which they purport to have been devised to them. *Gaines vs. New Orleans*, 6 Wall., 642; *Gaines vs. De La Croix*, 3 *id.*, 719. But while our conclusion has not been reached without hesitation and embarrassment, we think, notwithstanding the damage to which absent and non-resident heirs may thereby be exposed, he does, if he in fact purchased in good faith, and that public policy requires this solution of the question.

An application for the probate of a will is a proceeding *in rem*, and the judgment of the Court upon it is binding upon all the world until revoked or set aside. *Hodges vs. Bachman*, 8 Yerg., 186; *Scott vs. Calvit*, 3 How. (Miss.) 158; *State of California, vs. McGlinn*, 20 Cal., 271; 3 Redf. on Wills, 63. Now, it has often been held that acts done under authority by the judgment of a Court having jurisdiction of the estate, even where it is being administered under forged will, are just as valid and effectual as if the will had been genuine; that a payment voluntarily made to the executor named in a forged will is a valid discharge of the debt, though the will may be afterward set aside and annulled, the debtor cannot be required to pay the debt a second time. If the pretended will had required the executors to settle the will of Renn in the Probate Court, the acts done by them in pursuance of the orders of the Court carrying into effect provisions of the will, could not be impeached or set aside to the injury of innocent parties, because they have a right to rely upon the validity of the judgment of the Court. (5 Monr., 42; 11 Cush., 519; 9 Dana, 41; 9 Penn. St., 234; 6 Porter, 243; 13 Gratt., 682.)

Is there any difference in respect to the powers of the executors where the purported will directs the settlement of the estate out of the Court? By its judgment the Court has declared the instrument to be genuine. This judgment is binding upon all the world until reversed or annulled. Must innocent parties, when they act upon the faith of such judg-

ment, do so at the peril of its being subsequently shown to be erroneous? There is evidently a broad distinction in the position of a party claiming to be an innocent purchaser from one who has merely a forged deed and that of a like purchaser from the devisee in a forged will. In the former case the true owner is neither charged with notice of the forged deed, nor is he in any way committed to, or estopped from denying its validity, while in the latter the will is adjudged to be valid by a Court of competent jurisdiction in a proceeding to which the heir is a party. While it is in force the heirs are bound by it, and cannot deny its correctness, or dispute the validity of the devise. The purchaser from the devisee is authorized by the judgment to buy from him on the faith of a valid judgment of a Court of competent jurisdiction to which the heirs are parties by which it has been in effect determined that the estate of the testator vested in the vendor on the testator's death. The heirs being bound by the judgment, they occupy the position of one who has voluntarily parted with or been divested of his title, and then stands by and sees it sold to a purchaser in good faith without a word of complaint; that he afterward asserts his title and has the judgment reversed, or gets a decree canceling the probate of the will does not mend the matter. The purchase has been consummated. If, by the subsequent reversal of the judgment, he can annul the purchaser's title, he makes an innocent party the victim of his negligence and delay, and all distinction between *bona fide* and *mala fide* purchasers is destroyed.

For the error in the charge of the Court the judgment is reversed and the cause remanded.

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Current Topics.

IN *Gause vs. City of Clarksville*, at the March Term, 1879, of the U. S. Circuit Court for the Eastern District of Missouri, it was held: 1. Whether a Municipal Corporation possesses the power to borrow money and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the State applicable to it. 2. It has no incidental or inherent authority under the usual grants of municipal powers as a means of discharging its ordinary municipal functions. Such authority may be inferred from special and extraordinary powers, which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing, and when upon the whole legislation applicable to the municipality such appears to have been the legislative intent. 3. These principles applied, and coupon bonds to borrow money to erect and repair wharves and to open streets, issued under the general grants of municipal power in the charter, were held not to be binding upon the city, while other bonds, issued under a special act of the Legislature, in payment of stock in companies organized to construct macadamized roads from the city, were held to be valid. 4. Where bonds of a city are issued without authority for money borrowed and actually received by the city, the remedy against the city is not by an action on the bonds, but to recover the money.

Supreme Court of California.

JANUARY TERM, 1879.

(No. 4,150.)

[Filed March 28, 1879.]

HEINLEN, PLAINTIFF AND RESPONDENT,

VS.

MARTIN *et al.*, DEFENDANTS AND APPELLANT.

1. In the absence of a special demurrer on the ground of ambiguity, if it appear from the general framework of a complaint that the action is for specific performance, it will be so considered, though the complaint be obnoxious to criticism for want of perspicuity.
2. Under the statutes of this State, in force in the year 1867, a power of attorney for the sale and conveyance of land, which was not under seal, did not authorize the attorney to convey the legal title; but was sufficient to enable him to enter into a valid contract of sale.
3. In such a case, if the attorney enter into a contract of sale, and in the name of his principal execute to the purchaser a deed absolute in form, though inoperative to pass the legal title, it will be treated in a Court of Equity as a valid contract of sale, entitling the purchaser to a conveyance of the legal title; and if the purchaser, by a conveyance absolute in form, convey his interest in the premises to a third person, the conveyance will be deemed, in a Court of Equity, an assignment of the contract of sale.
4. If a power of attorney for the sale and conveyance of land in this State executed in the Republic of Mexico, be written by the Notary in his official book kept for that purpose according to the usage prevailing in that country, and if the instrument so written in the official book be duly signed, acknowledged and certified, as required by the laws of this State, and if Notary thereupon deliver to the attorney a certified copy of the original, these facts will constitute sufficient evidence of delivery.
5. Under the laws of this State, in force in the year 1867, a married woman could not execute a valid power of attorney to sell or convey her separate real estate, situate in this State, unless her husband united in the execution of it.
6. *Held*, that from the findings in this case, it sufficiently appears that the plaintiff paid to Aguayo the \$5,000 stipulated to be paid as the consideration for the conveyance from the latter to the former, as averred in the complaint, and that the plaintiff succeeded to the rights acquired by Aguayo under the conveyance of January 2, 1867.

7. On the facts found, the Court below would have been justified in decreeing to the plaintiff the rental value of the land from the commencement of the action.
8. The commencement of this action was a sufficient demand for a conveyance, and from that time the plaintiff is entitled to rents and profits.

Appeal from Third District Court, county of Santa Clara.
Houghton & Reynolds, Attorneys for Appellants.

Frs. E. Spencer & Wm. Matthews, Attorneys for Resp'ts.

CROCKETT, J., delivered the opinion.

The defendants contend, that on the face of the complaint, this is not an action for specific performance, but an action at law on an alleged legal title, for the recovery of land. We are of opinion, however, that though the complaint is obnoxious to criticism, it sufficiently appears on the face of it, that the action is for the specific performance of a contract for the conveyance of land. There was no special demurrer on the ground of ambiguity.

Both parties claim under the six heirs of Arguello, who are conceded to have been the owners in fee, and the title of the plaintiff, as stated in the complaint, is deraigned through, 1st, a power of attorney not under seal, from the six Arguellos to Camarina, with a power of substitution; 2d, a substitution by Camarina of Splivalo, under the power; 3d, a deed, absolute in form, from the six Arguellos by Splivalo as attorney in fact, to Aguayo, for the consideration of \$5,000; 4th, a subsequent deed from Aguayo to the plaintiff for the consideration of \$5,000, which the complaint avers was paid by the plaintiff to Aguayo at the time of the execution of the deed. It is contended by the defendants, that the power of attorney is invalid for want of a sufficient delivery; and it appeared in evidence that the instrument was executed in the Republic of Mexico, before a Notary Public, in the usual manner prevailing in that country; that the power was written by the Notary in his official book kept for that purpose, was duly signed and acknowledged by the parties and duly certified by the Notary, in the form required by our statute; and as the original was written and signed in the official book, and for that reason could not, in a literal sense,

be delivered to the attorney, a copy duly certified by the Notary was delivered to the attorney named in the power. We are of opinion, that in contemplation of law, these facts constituted a sufficient delivery.

But it appeared on the face of the power of attorney, that one of the persons who signed it was a married woman, and the husband did not unite in the execution of the power. As our statute then stood, a married woman could not make a valid power of attorney to convey her separate real estate, unless her husband united in the execution of it, and as to this woman, the power of attorney was inoperative, and conferred no authority to dispose of her interest in the land.

The power of attorney to Splivalo was not under seal, and, under the then existing statutes of this State, was insufficient to enable the attorney to convey the legal title, but, on well-settled principles, was operative to enable him to enter into a valid contract of sale. By reason of this defect in the power of attorney, the deed to Aguayo did not pass the legal title; but, in a Court of Equity, will be deemed a contract of sale, entitling the vendee to a conveyance of the legal title. The deed from Aguayo to the plaintiff, operated in law, as an assignment of the equitable title held by the former, under the deed of January 2, 1867.

The complaint avers, as already stated, that when the plaintiff took the conveyance from Aguayo, he paid him as the consideration therefor, the sum of \$5,000. The Court does not, in terms, find this fact. But it finds that Splivalo then had in his hands \$2,250, before that time paid to him by the plaintiff under the contract of May 10, 1866; and that when the plaintiff received the deed from Aguayo, he paid to Splivalo the further sum of \$2,750, and thereupon, then and there, Splivalo paid to Aguayo the sum of \$5,000. It was all one transaction, and in legal effect, it was a payment by the plaintiff to Aguayo, through Splivalo, who then had in his hands \$2,250 of the plaintiff's money, and to whom the plaintiff then paid the further sum of \$2,750, making in the aggregate the sum of \$5,000, the whole amount agreed to be paid. In his testimony, Splivalo thus explains the

transaction: "Instead of my returning the \$2,250 to John Hienlen, and he making the payment to Aguayo, I paid Aguayo directly, and Hienlen paid me the balance of \$2,750; it was all done at one and the same moment at my office." In the light of this testimony, (which is uncontradicted), there can be no doubt, that in legal effect, it was a payment of \$5,000 by the plaintiff to Aguayo.

It has been suggested, that the legal effect of this transaction was simply a rescission of the contract between Splivalo and Aguayo, and a performance of the contract of May 10, 1866, between the plaintiff and Splivalo; and, consequently, that the plaintiff must stand on that contract alone, and acquired no new equity under the conveyance from Aguayo. On the contrary, it is clear, from the findings and proofs, that as between the plaintiff and Splivalo, the transaction with Aguayo was practically an abandonment of the contract of May 10, 1866; and as a substitute therefor, the plaintiff accepted the conveyance from Aguayo and paid him the full consideration, to wit, \$5,000. That the contract of May 10, 1866, was abandoned, is evident from the fact, that Splivalo, with the plaintiffs' consent, paid to Aguayo the \$2,250 before then paid under the contract of May 10, 1866. If, after the transaction with Aguayo, the plaintiff had brought an action for the specific performance of the contract of May 10, 1866, he must have failed, on the ground that the contract was abandoned when he accepted the conveyance from Aguayo, and authorized Splivalo to pay to him the \$2,250 before then paid under the contract. The contract was merged in the transaction with Aguayo, and thenceforth ceased to be obligatory on either of the parties to it. But the defendants contend, that the finding to the effect that \$2,750 was paid by the plaintiffs to Splivalo on the 15th of March, 1867, was not justified by the evidence. We are, however, of opinion that there was evidence tending to support the finding, and that it ought not to be disturbed on this ground.

The defendants further insist that, under the pleadings, the contract of May 10, 1866, was not admissible in evidence for any purpose. But, if for no other purpose, it was cer-

tainly admissible to prove the payment by the plaintiff of the \$2,250, and the circumstances under which it was made, and as explanatory of the transaction with Aguayo. It is for these purposes only that we have considered it.

The Court finds that the rights the defendants acquired from the Arguellos, if any, were acquired with full notice of the conveyance to Aguayo, and of the consideration paid by him, and before payment by them, of any part of the purchase money. It results from these views, that from the findings, and without reference to the contract of May 10, 1866, as a basis for equitable relief, the plaintiff is the equitable owner of five undivided sixths of the land in controversy, and is entitled to a conveyance by the defendants of the legal title thereto.

This brings us to the question, whether the Court below erred in awarding to the plaintiff the rental value of the land during the time the defendants have occupied it. The argument for the defendants is, first, that even though the plaintiff be conceded to be the equitable owner, by virtue of his contract of purchase, he did not thereby become entitled to the possession, in the absence of an agreement to let him into the possession; and that not being entitled to the possession, he cannot recover rents and profits; 2d, that the plaintiff made no demand for a conveyance prior to the commencement of the action.

In discussing this question, it will be borne in mind, that from the 15th of March, 1867, until the present time, the plaintiff has been, and yet is, the equitable owner of five undivided sixths of the land, the legal title to which has been, and yet is, held by the defendants, who are entitled to the remaining one undivided sixth. As to the five undivided sixths, the defendants have held the dry, legal title as trustees for the plaintiff, and as the Court finds, have held the possession of the whole, from November, 1868, excluding the plaintiff therefrom. They entered, claiming the exclusive right to the possession, and in their answer deny the plaintiffs' title to any portion of the land, and assert an exclusive right in themselves from the time of the conveyance

by the Arguellos to them, in the year 1867. They have forced the plaintiff to appeal to a Court of Equity to compel a conveyance of the legal title, and during the long interim which has elapsed have enjoyed the use of the land. When the plaintiff shall have acquired the legal title he cannot maintain an action at law for mesne profits.

At common law, the plaintiff in ejectment could not recover the mesne profits in the same action, but was compelled to establish his title, or right, to the possession by the judgment in ejectment, and might then prosecute his action of trespass for mesne profits, on the trial of which the judgment in ejectment would be conclusive evidence of his prior right to the possession under a legal title, and of the ouster by the defendants. But the theory of the action for mesne profits was, that the plaintiff had all the time held the legal title, and had been ousted by the defendant; and the rental value of the land, while the plaintiff was deprived of the possession, was awarded in the room of damages. But under our statute, the mesne profits may be recovered in the action of ejectment, which, however, can only be maintained on the legal title. If the plaintiff holds only the equitable title, and is forced to go into a Court of Equity to compel a conveyance of the legal title, it is well settled that he cannot afterward maintain an action at law for the mesne profits, for the reasons already indicated; that if he cannot recover rents and profits in the action in equity, he is without remedy. But, fortunately, a Court of Equity will not permit so great a wrong, and will afford complete relief in such a case. "If there is a trust estate, and *cestui que trust* comes into equity upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits." (1 *Story, Eq. S.*, 512; 3 *Atk. R.*, 124.)

We think this is the correct rule, and we find no authority to the contrary. It is in consonance with the general principle, that a Court of Equity will do complete justice in a cause of which it has jurisdiction; and more particularly if there be no other remedy to prevent a failure of justice. But the rule as stated by Story is, that the plaintiff is en-

titled to an *account* of the rents and profits; and the defendants contend that the rule applies only where the premises have been let at rent by the defendant, and where he has actually received rents as such, and has no application where the defendant, as in this case, has himself occupied the premises and has received no rents. On this theory, the plaintiff is absolutely without remedy, and that, too, for no better reason than that the defendant, instead of renting the land to tenants, has himself occupied it and enjoyed its fruits. But, Courts of Equity do not administer relief in such cases on an inflexible rule of this character. On the contrary, the relief varies, according to the exigency of the particular case, so as to prevent a failure of justice. *Worrall vs. Munn*, 38 N. Y., 137, was an action for the specific performance of a contract to convey a parcel of land, valuable only for beds of clay suitable for making bricks, and utterly valueless for any other purpose. After the executory contract of sale was entered into, the vendor sold and conveyed the premises to the defendant Munn, who took the title with notice of the plaintiffs' equity, and who occupied the premises for the manufacture of bricks. One of the questions was, to what compensation the plaintiff was entitled for having been kept out of the possession for a series of years; and in discussing this point the Court said: "The general rule on this subject, as laid down by the elementary writers, and in the adjudged cases, is, that the Court of Equity will, so far as possible, place the parties in the same situation as they would have been if the contract had been performed according to its terms; and, to that end, the vendor will be regarded as trustee for the benefit of the purchaser, and liable to account to him for the rents and profits; and the purchaser will be treated as trustee of the purchase money, if not paid, and will be charged with interest thereon. *And when the vendor is himself in the actual occupation of the premises, he is charged with the value of the use and occupation.* (*Robertson vs. Skelton*, 12 Beav., 366; *Dyer vs. Hargrave*, 10 Ves., 506.)

But, while this is the general rule, it is not inflexible; a

Court of Equity moulds its own relief, and gives redress, according to the circumstances of each case.

In that case the land had no rental value, and yet the plaintiff had been deprived of the opportunity to use it, for the only purpose for which it was valuable and for which he had purchased it, and it was contended that he should be awarded as damages such profits as he could have made by the manufacture of bricks. But the Court held such damages to be speculative and too remote, and to prevent a failure of justice, they awarded as damages interest on the purchase money during the time the possession was withheld. This case is cited not only in support of the proposition that the vendor in the actual occupation is chargeable with the value of the use and occupation, if the premises have a rental value, but also as demonstrating the flexibility with which Courts of Equity, in this class of cases, adapt the remedy to the exigency of the particular case so as to prevent a failure of justice. (In *Cole vs. Tyson*, 8 Iredell Eq., N. C., 170,) the vendee, under an executory contract of sale, was let into the possession, and after a portion of the purchase money was paid, died, leaving minor children as his heirs at law. Thereupon the vendor took possession of the land, denying the title of the heirs, and claiming to be the absolute owner. The heirs brought an action for specific performance; and one of the questions was, whether the vendor was chargeable with the rental value of the land during his occupation. RUFFIN, C. J., in delivering the opinion of the Court, said: "His, (the vendor's), entry was in avoidance of his note, and so was wrongful in the view of the Court of Equity, in which he, as vendor, is regarded as a trustee for the vendee, except only in respect of the estate being a security for the price." Again he says, "instead of the fair and legal course of filing a bill, (to enforce a vendor's lien,) the vendor, upon the mere force of his legal title, and taking advantage of the incapacity and helplessness of the vendee's children, injuriously denied any rights in them, and claimed a perfect title in himself, as well in equity as at law, and as such, entered, and in all respects acted, as owner, by pulling down and

selling houses and building others, and finally by conveying the fee. One thus abusing the power given by the legal title and denying the rights of infants, for whom he was trustee, cannot be looked on in a Court of Equity in any light but that of a *tortfeasor*, by reason of a wilful and gross breach of trust, and, therefore, he is justly chargeable with the highest occupier's rent from the moment of the breach of trust."

In the case at bar, the plaintiff, it is true, is not a minor; but he was entitled to a conveyance of the legal title in March, 1867, and in November, 1868, the defendants, with notice of his equity, entered into the exclusive possession, denying his rights, either in equity or at law, and claiming to be the absolute owners. For more than ten years they have persistently denied his rights, have excluded him from the possession, and during the whole period have themselves enjoyed the fruits of the land, while holding only the dry, legal title as trustees of the plaintiff. One thus abusing the power given him by the legal title, must, in a Court of Equity, as against the *cestui que trust*, be deemed a wrongdoer, and should be held to account for the rental value of the land. In a similar case, the Court of Appeals of Kentucky, in (*Baxter vs. Brand*, 6 Dana, 296,) charged the vendor with the "reasonable profits" of the land during the time he occupied it, and as we understand the term "reasonable profits" in the sense in which it was used, it is the equivalent of the rental value of the land.

If the defendants are to account for rents and profits, or for the value of the use and occupation, the amount can be ascertained only in one or two methods—either, first, by charging them with the rental value of the land, as was done by the Court Below; or, second, by taking an account in which they would be debited with all sums realized, or which, with reasonable diligence, might have been realized, from the cultivation and use of the land, and crediting them with all necessary or proper disbursements. If it should appear, on stating the account, that the disbursements equalled, or exceeded, the receipts, the plaintiff would get

nothing, although for ten years or more he had been deprived of the opportunity to let the land at rent, or to devote it to such other use as his interest or convenience dictated. In other words, he would have been forced, against his consent, during all these years, to accept the defendants as his agents to conduct the business of farming his own land at his expense and risk.

Whatever may be the rule where a trustee has not himself occupied and enjoyed the trust estate, but has received rents from it, justice and equity demand, that where he has wrongfully excluded the true owner, and has himself occupied and enjoyed the fruits of the estate, he shall at least account for its rental value. It is a favorite maxim with a Court of Equity, that it will consider as done, that which ought to be done, and in such a forum, the defendants will be deemed to occupy the same position as though they had conveyed to the plaintiff the legal title when it was their duty to convey it, and had then refused to surrender the possession, and had continued to occupy and enjoy the fruits of the land. If they had done this, no one will doubt that the plaintiff could have recovered the rental value of the land in an action at law.

In the view of a Court of Equity, the plaintiff is to be deemed the owner from the time he became entitled to a conveyance of the legal title; and in analogy, to the relief granted at law, he may recover the rental value of the land.

But it is further contended, that the defendants were in no default until after demand was made for a conveyance, and that neither the findings or evidence show a demand prior to the commencement of the action. It is, therefore, insisted that the judgment is erroneous, in so far as it charges the defendants with rents and profits, prior to the commencement of the action.

This point is well taken, unless it affirmatively appears from the pleadings and findings, that a demand would have been refused, and would, therefore, have been unavailing. The commencement of the action was undoubtedly a sufficient demand; and from that time, the plaintiff was entitled to

rents and profits; but we cannot say that it affirmatively appears, from the pleadings and findings, that a prior demand would have been refused.

Judgment and order reversed, and cause remanded, with an order to the Court below to modify its judgment in accordance with this opinion.

Remittitur forthwith.

We concur:

McKINSTBY, J.

NILES, J.

DISSENTING OPINION.

I would readily concur in several of the propositions discussed in the foregoing opinion, if, in my judgment, they were presented by the record; but as I view the case, the contract, which is specifically enforced, is not pleaded, and its introduction in evidence was objected to by the defendants. I, therefore, dissent from the opinion and judgment.

RHODES, J.

(WALLACE, C. J., being disqualified, did not participate in the decision.)

[No. 3,698.]

[Filed March 31, 1879.]

BIGLEY, PLAINTIFF AND RESPONDENT,

VS.

NUNAN *et als.*, DEFENDANTS AND APPELLANTS.

To maintain an action for special damages caused by an obstruction of a highway, constituting a public nuisance, a plaintiff must have suffered injury different in kind from that sustained by the public at large.

Appeal from Courty Court of the city and county of San Francisco.

George & Loughborough, Attorneys for Appellants.

Hutton & O'Neill, Attorneys for Respondent.

PER CURIAM.

The obstruction of the alleged highway consists of a fence running lengthwise along the middle of the street, and con-

nected by cross fences with the side of the street *opposite* to premises of plaintiff. The access from plaintiff's lot to the street has not been cut off or impeded, and if plaintiff and his immediate neighbors have more occasion to pass through the street than the public at large, this is an inconvenience in degree only, and is not an injury in *kind* different from that sustained by the public.

The only damage complained of by plaintiff is, that by reason of the obstruction, "his said property is lessened and decreased in value." But it has been expressly held by this Court, that in an action to recover special damages, caused by there being an obstruction in the street opposite the residence of a plaintiff, evidence to show that the land would sell for less on account of the nuisance is not admissible. In such cases a defendant is liable only for the special and particular damages sustained prior to the commencement of the suit. The nuisance may be abated or removed, and to give damages on account of the decreased *value of the land*, would be to give damages for all the injury the premises would ever sustain, which would be clearly wrong. (See *Hopkins vs. W. P. R. R. Co.*, 50 Cal., 194, and cases there cited.)

It is the pecuniary damage suffered which constitutes the basis of the action, considered as an action at law.

If the present be treated as a bill in equity for an injunction, the rule is equally without exception, in reference to private actions for obstructions of public highways, that the injury complained of must be special in character, and not merely greater in degree, than that of the general public. (*Wood's Law of Nuisance*, sec 655.)

In the present case, no such special damage has been sustained.

Judgment and order reversed, and Court below directed to dismiss the action.

Remittitur forthwith.

(Mr. Justice CROCKETT expressed no opinion.)

[No. 10,390.]

[Filed March 24, 1878.]

PEOPLE vs. HICKS.

An instruction that if the jury "believed any witness had, upon the stand wilfully sworn falsely in respect to any matter material to the issue on trial, they should disregard his testimony altogether," was properly refused.

Appeal from the Fifteenth District Court, city and county of San Francisco.

D. J. Murphy, District Attorney, for the People.

G. W. Tyler, Attorney for Hicks.

CROCKETT, J., delivered the opinion of the Court.

At the trial, the Court instructed the jury in the words of Subdivision 3 of Section 2061, of the Code of Civil Procedure that "a witness false in one part of his testimony is to be distrusted in others." But the counsel for the defendant asked the Court to charge the jury, "that if they believed any witness had, upon the stand, wilfully sworn falsely in respect to any matter material to the issue on trial, that they should disregard his testimony altogether." The Court refused to give the instruction, and its refusal is relied upon as error.

In *People vs. Sprague*, No. 10,376, decided at the present term, we held that the correct interpretation of Subdivision 3, of Section 2061, of the Code of Civil Procedure, is that a witness *wilfully* false in one part of his testimony is to be distrusted in others. Assuming this to be the correct construction, the effect of this provision is, that if a witness is wilfully false in one portion of his testimony, he "is to be distrusted in others;" and not that his whole testimony is to be absolutely rejected. If the rule was otherwise at common law, the Code has changed it.

The instruction as asked was correctly refused.

Judgment affirmed.

We concur :

NILES, J.

McKINSTY, J.

WALLACE, C. J.

Supreme Court of the United States.

OCTOBER TERM, 1878.

[No. 174.]

STEPHEN D. HOSMER, PLAINTIFF IN ERROR,

VS.

WILLIAM T. WALLACE.

1. To create a right of pre-emption, there must be settlement, inhabitation and improvement by the pre-emptor, conditions which cannot be met when the land is in the occupation of another. (*Atherton vs. Fowler*, 6 U. S., 516.)
2. The object of the Act of 1866, was to withdraw land continuously possessed and improved by a purchaser, under a Mexican grant, from the general operations of the pre-emption laws, and to give to him, to the exclusion of all other claimants, the right to obtain the title.—
[EDITOR LAW JOURNAL.]

Error to the Supreme Court of the State of California.

Mr. Justice FIELD delivered the opinion of the Court.

The defendant has a patent of the United States for certain land in the county of Santa Clara, in the State of California. The plaintiff claims, that he has an equitable right to the land by virtue of his settlement thereon, and subsequent proceedings under the pre-emption laws; and, therefore, seeks to charge the defendant, as trustee of the title, for his benefit, and to compel its transfer to him.

It appears, from the record, that the premises are within the boundaries of a grant made by the former government of Mexico to one Estrada. The grants of that government in California were sometimes of tracts with defined boundaries, and sometimes of places by name where the boundaries were known and could be readily identified; but more frequently they were of a specified quantity of land within boundaries embracing a larger amount, to be measured off and segregated by magistrates of the vicinage. A grant of the latter class was usually in form of the entire tract within the boundaries mentioned, with a condition limiting its extent to the quantity specified; the surplus, after the measurement,

being reserved for the use of the nation. The grantee could not measure off the quantity thus specified so as to bind the government. This could be done only by its officers pursuant to regulations established for that purpose. Until the segregation was thus made, no third person could interfere with the grantee's possession, and attempt to limit it to any particular place within the boundaries designated.

Soon after the acquisition of California, Congress provided by law for an examination of the various grants of land made by the former government, the confirmation of such as were found to be valid and entitled to recognition, the survey and measurement of the tracts, or quantities granted, and the issue of patents to the confirmees. And in order that these proceedings might not be defeated, and that the rights of the grantees in the meantime should not be impaired or embarrassed by the settlement of others, upon pretense that the grants were invalid, or that there was a surplus within their boundaries over the quantity granted, which could be appropriated, the lands claimed under these grants were accepted from the operation of the pre-emption laws, when they were extended over the State.

In the investigations thus authorized, many grants, supposed to be valid, were rejected; and in numerous instances, land purchased from the grantees, and improved, was excluded by the surveys from the tracts confirmed. To meet the hardships thus arising, and to enable purchasers in good faith, and for value, to hold the tracts improved by them, Congress, in an act passed on the 23d of July, 1866, to quiet the title to lands in California, provided as follows:

"That where persons in good faith, and for a valuable consideration, have purchased land of Mexican grantees, or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved and continued in the actual possession of the same, according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same after having

such lands surveyed under existing laws, at the minimum price established by law, upon first making proofs of the facts * * * under regulations to be provided by the Commissioner of the General Land Office." (14 Stats. 220, § 7.)

In the present case, it appears that prior to February, 1862, Estrada, the original grantee of the Mexican government, sold to one Lyons his right to a portion of the land within the boundaries mentioned in his grant, embracing the premises in controversy; that, previously, in October, 1856, the plaintiff had settled upon these premises, and erected a house thereon, claiming that he made the settlement under the pre-emption laws of the United States; that, in February, 1862, he was evicted from them by the Sheriff of the county under a judgment in ejectment recovered by Lyons; and that thereupon he removed his house and improvements to adjacent land. After this eviction, the defendant purchased from Lyons his right under the grant to the premises, and has ever since been in their actual possession and use. The grant had been previously confirmed, but for a less quantity than that contained within the boundaries mentioned; and, upon the final survey, which was approved in June, 1865, after the defendant's purchase, these premises were excluded. The public surveys were subsequently extended over the land, and, in July, 1866, the plaintiff filed a declaratory statement in the proper land office, claiming to pre-empt the premises, together with other land, alleging his settlement thereon in October, 1856, and in September following, made proof of his claim before the Register and Receiver, and was allowed to enter the land. He then paid the purchase money and obtained a certificate of payment. In the meantime, the act of July 23d, 1866, was passed, and under it the defendant claimed the right to purchase the premises. The Commissioner of the General Land Office, thereupon, directed the Register and Receiver at San Francisco to investigate the entry of the plaintiff, and to take such testimony as might be offered by him and the defendant concerning their respective claims, and to report the same to him,

together with their decision. Both parties appeared before these officers and supported their respective claims. The decision of the officers was in favor of the plaintiff; the defendant appealed to the Commissioner, by whom the decision was reversed, and the land awarded to him. On further appeal to the Secretary of the Interior, the decision of the Commissioner was affirmed; and, upon payment of the purchase money, a patent was issued to the defendant.

The decision of the Commissioner, and of the Secretary, was clearly correct. The plaintiff had acquired, by his settlement, in 1856, no such interest in the premises as could control the disposition of them by the United States, should it be ultimately determined that they were not covered by the grant. The land within the boundaries of the grant was not open to settlement under the pre-emption laws; and his occupation, from 1856 to his eviction in 1862, was that of a trespasser, and did not originate any rights which the government was bound to respect. The land was not, then, "public land," in the sense of those laws; and even if it had been public land, to which no private claim was made, it would not have been subject to settlement under them until it had been surveyed. The act of Congress of March 3d, 1853, allowing a settlement on unsurveyed lands in California, was limited in its operation to one year. (10 U. S. Stat., 246, proviso to sec. 6.) By the act of March 1, 1854, this privilege was extended for two years from that date, when it expired. (Ibid., 268.) No other statute was passed opening unsurveyed lands in California to pre-emption settlement until May 30th, 1862. (12 U. S., 409.) The occupation, therefore, of the plaintiff, in October, 1856, was a mere intrusion upon the claim of another, without any license of the government; and after he was evicted by legal process in February, 1862, the premises were in the possession of the defendant, and, therefore, not open to settlement by him. Whatever right of pre-emption the plaintiff acquired, by his settlement, to land outside of the boundaries of the Mexican grant originated after May 30, 1862; but as to land within those boundaries, no right could be initiated

until the land was excluded from the tract, confirmed by the approved survey, in June, 1865. In neither case, could the right of pre-emption extend to land in the occupation of the defendant at those dates. To create a right of pre-emption there must be settlement, inhabitation and improvement by the pre-emptor, conditions which cannot be met when the land is in the occupation of another. Settlement, inhabitation and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it prove to be part of the same sectional subdivision. Under the pre-emption laws, as held in (*Atherton vs. Fowler*, 96 U. S., 516,) the right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling-house is to be exercised on vacant land; none of these things can be done on land when it is occupied and used by others.

There was, therefore, no valid adverse right or title, except that of the United States, to the premises in controversy when they were excluded by the approved survey from the tract confirmed; nor had the plaintiff the right of a pre-emption claimant to them. No just ground, consequently, existed for refusing to the defendant the privilege of purchasing them under the act of 1866. It is found by the Court that he bought the land, in good faith, and for a valuable consideration, from the assignee of the Mexican grantee before the survey of the grant; and that it has since been in his actual possession and use, according to the lines of his original purchase. And besides, the use, occupation and improvement of the land, required by that act, being matters for the determination of the officers of the Land Department, it must be presumed from their decision that they were sufficiently established.

The contention of the plaintiff, if we understand it, is that the proviso in the eighth section of the act of 1866 changed the doctrine stated, and gave him a right of pre-emption to

land excluded by the survey from the tract confirmed, although it was at the time in the occupation of the defendant. The proviso is, that nothing in the act "shall be construed so as in any manner to interfere with the right of *bona fide* pre-emption claimants;" and it is argued, that some operation must have been intended to be given it, and that it can have none against a purchase by the claimant under the grant title, unless a pre-emption right could be acquired to the land whilst in his possession. Conceding this to be correct, we do not perceive that the conclusion follows for which the plaintiff contends. If the proviso can have no operation against a purchase by a claimant under the grant title, it is for the obvious reason, that the conditions upon which the claimant can make a purchase are incompatible with those upon which a pre-emption right can arise. The inference is, that the proviso must be applied to other land which the act mentions. The object of the act was to withdraw land continuously possessed and improved by a purchaser under a Mexican grant from the general operation of the pre-emption laws, and to give to him, to the exclusion of all other claimants, the right to obtain the title. That it was competent for Congress to deal with the land as it chose, does not admit of question. No vested rights in the land could be acquired by any one until it was open to settlement; nor afterward, unless the pre-emptor made his entry and obtained a patent certificate before the passage of the act. (*Frisbie vs. Whitney*, 9 Wallace, 187; *The Yosemite Valley Case*, 15 Id., 77.)

The term "*bona fide*," as applied to the pre-emption claimant, does not change the qualifications of such claimant, nor the conditions upon which, under the general law, a settlement with a view to pre-emption is permitted. It was intended to designate one who had settled upon land subject to pre-emption, with the intention to acquire its title, and had complied, or was proceeding to comply, in good faith, with the requirements of the law to perfect his right to it. The plaintiff does not come within this class.

Judgment affirmed.

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Current Topics.

THE calendar for the May term of the Supreme Court, to be held at Sacramento, will be made up on April 19, 1879, and consist of all criminal cases on file, and all civil cases from the counties of Alpine, Amador, Butte, Colusa, El Dorado, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, Sierra, Sutter, Shasta, Siskiyou, Tehama, Tuolumne, Trinity, Yolo and Yuba. Cases from other counties may be placed on the calendar by stipulation, to be filed with the Clerk, at his office, in San Francisco, on or before April 19th.

JUDGE DAINGERFIELD, in the case of *Stafford vs. The Southern Pacific Railroad Company*, decided an interesting question affecting the rights of passengers and railroad companies. It was to the effect, that it was the duty of the passenger to tender the amount charged to a point designated by the passenger, and that the tender of a sum of money, with the request that the company carry him as far as it would take him, was not a compliance with the law, so as to compel the company to carry him. The passenger must elect his designation and tender the necessary amount in order to insure his passage. If he fail to do so, the company may eject him, using no more force than is necessary for the purpose.

In the case of *Lent et al., vs. Mitchell*, on motion to dissolve the injunction, Judge Daingerfield, of the Fourth District Court, continued the motion to give the complainants full time to read and rebut the affidavits filed by the defendants, remarking that it was the established rule and practice in that Court to allow the plaintiff, in such cases, time to prepare and file rebutting affidavits. The continuance was strenuously opposed by the defendants, on the ground that a continuance beyond Monday next, would defeat the sale for the taxes for this year. The Court granted a continuance until Friday next.

Supreme Court of California.

JANUARY TERM, 1879.

[No. 6,040.]

[Filed April 3, 1879.]

CITY OF LOS ANGELES, PLAINTIFF AND APPELLANT.

VS.

BALDWIN *et al.*, DEFENDANTS AND RESPONDENTS.

1. The City of Los Angeles is not the owner of the corpus of the water in the Los Angeles river.
2. A judgment determining the rights of parties as riparian proprietors on the same stream of water is conclusive when the conditions remain unchanged.

Appeal from Seventeenth District Court, Los Angeles County.

J. F. Godfrey and A. W. Hutton, Attorneys for Appellant.

Howard, Brousseau & Howard and F. Ganahl, Attorneys for Respondents.

WALLACE, C. J., delivered the opinion of the Court.

1. The claim set up by the city in this action, that the city is the owner of the *corpus* of the water in the Los Angeles river finds no support in the evidence.

2. Nor does the fact that the city is a lower riparian proprietor entitle her to judgment in her favor. The defendants are upper riparian proprietors on the same stream. In the former action, between these parties it was adjudged that the diversion of the water by the defendants, to the extent and in the manner in which they then diverted it, was such, as being riparian proprietors, they might lawfully make. The conditions do not appear to be different now from what they then were. The diversion by the defendants is the

same now as then, and while these conditions continue unchanged, the judgment rendered in the former action operates a bar between the parties here.

Judgment and order affirmed.

We concur:

NILES, J.

McKINSTREY, J.

OPINION OF RHODES, J.

In the *former action*, brought by the plaintiff against the defendants, the complaint alleges:

That the plaintiff at a time named "was, and still is, entitled to the full and free use and enjoyment of all the water flowing in the river Los Angeles, and to all waters flowing in the ditch hereinafter mentioned, and in the full, free and exclusive use of said ditch"—(the Canal and Reservoir Company's ditch); that the plaintiff was in the actual use and enjoyment of a portion of the waters of the river—three irrigating heads—through and by means of the ditch; that the defendants did, and still continue, wrongfully to divert the waters from the ditch, and use and consume the same upon their own lands, to the plaintiff's damage, etc.

It is further alleged, that the pueblo de Los Angeles was from its first settlement, about the year 1770, up to the incorporation of the city of Los Angeles, entitled to the use of all the waters of the river, and did claim and use the same, that the city succeeded to all the rights therein of the pueblo; that the Canal and Reservoir Company constructed a reservoir in the city, and a ditch leading from the river to the reservoir, which, at the commencement of that action, were in the possession of the plaintiff, under a lease from said company, and were used by the city to supply its inhabitants with water; that the defendants claim an interest in the Rancho Los Feliz, situated on the river, and are in possession of portions thereof, and deny the plaintiff's right to the waters of the river; that they have diverted the waters from the ditch, upon their own lands, and threaten to con-

tinue so to do. The prayer was for an injunction and for damages.

The answer denies the plaintiff's alleged ownership and right to the use, or appropriation, of the water of the river, or the water flowing in the ditch. It also avers, the grant of the Los Feliz rancho in 1843, the issue of a patent for the same, in 1858, and the acquisition of the title, by the defendants; and avers, that they, as riparian proprietors, are entitled to the reasonable use of the waters of the river, for irrigation and domestic uses, that they have never taken more than such reasonable amount, and that they and their grantors have continuously, since 1853, claimed and used the water flowing in the ditch, to the amount of two irrigating heads. It also alleges, that the grantors of the defendant constructed the ditch from the river to, and upon, the rancho; that they afterward granted the same to the Canal and Reservoir Company, subject to certain conditions and covenants; that the company extended the same to the reservoir, and afterward leased the same to the city, and that by virtue of those covenants and conditions, they were entitled to take from the ditch all the water necessary for the irrigation of the rancho, which has never exceeded two irrigating heads. The defendants also set up the Statute of Limitation.

The Court found that the Los Feliz rancho was granted by the Mexican government in 1843; that a patent, in pursuance of the decree of confirmation of the title to the rancho, was issued in 1858; that it is bounded on the east by the river; that the defendants—who have been the owners of the rancho since 1871—and their grantors have, since the grant of the rancho, continuously claimed and exercised the right to take water from the said river for the purpose of irrigating the rancho, adversely to the "plaintiff and the whole world;" that they have not taken more than their fair proportion of water for irrigation, as riparian proprietors.

It is also found, that the ditch and right of way were granted, as stated in the answer—reserving the right to use from the ditch, all the water necessary to irrigate the rancho

—and, that the plaintiff is the lessee of the ditch, and has no other right therein than as such lessee.

It is further found, that at the commencement of the action, the city had a surplus of water, above what was needed for irrigation in the city, which it was selling for irrigating lands without the city; and that there is a surplus of water in the ditch over and above the needs of the city.

There is no finding as to the right or title of the city in or to the waters of the river.

Judgment was given that the plaintiff take nothing by the action, and that defendants recover their costs.

The complaint, in the *present action*, states that the plaintiff is, and for a long time has been, the owner of the waters of the river, and is entitled to the full, free and exclusive use of the waters of the river and the waters flowing in the ditches connected with the river, and has the right to regulate and control the use and distribution thereof. The remainder of the complaint is in the usual form of actions to quiet title to real estate.

The answer denies the exclusive right of the city to the waters of the river, or the waters flowing in the ditches connected therewith, and denies the right of the city to regulate and control the use or distribution of the waters.

The answer, like that in the former action, sets up the title of the defendants to the Los Feliz rancho, derived through the grant, the confirmation of the title, and the patent issued in pursuance of the decree of confirmation; and states that the rancho is bounded on the east by the river, that the grantees of the rancho and their assigns since the grant, have continuously claimed and exercised the right, adversely to the plaintiff and all the world, to use the waters of the river for irrigation, and that they have not taken more than their fair proportion of the waters, to wit, two irrigating heads. As in the former action, the answer states the construction of the ditch, the grant of the same, and the right of way for its extension, to the Canal and Reservoir Company, its extension by the company to the city, a lease of the same by the company to the city, the reservation in the

grant to the company of the right on the part of the defendants to take from the ditch all the waters necessary for the irrigation of the lands of the rancho; and avers, that the right of the city to the waters of the ditch are derived from the lease. It also avers, that the city had a surplus of waters, both of waters flowing in the ditch and of that which is taken from the river by other ditches, above the amount needed for irrigation in the city, which it is selling to parties for use without the city.

The answer sets up in bar the former judgment, and the Statute of Limitations.

The Court found that the former action was brought for substantially the same cause of action as that set forth in the complaint herein; that there was put in issue the right of the defendants to appropriate, and use upon the Los Feliz rancho, the amount of water then used by them from the river, to wit, two irrigating heads; that said issue was material, and was determined in favor of the defendants; that all the issues presented by the pleadings in this action, except that of former recovery, were presented by the pleadings in the former action; that they were material issues, and were determined in favor of the defendants by the judgment in the former action.

The Court also found the other facts in issue in substantial conformity with the findings in the former action—and among others, that since 1871 the defendants have continuously claimed and exercised the right to appropriate and use the waters to the extent of two irrigating heads adversely to the plaintiff. It is also found that the plaintiff has shown no grant of the waters of the river other than such as inured to it, from the fact that the river flowed through the lands of the pueblo and of the city; also, that of the waters conducted into the city, there is a surplus, which the city is selling to parties without the city.

The action is an action to quiet the title of the city to all the waters of the river. The defendants did not distinctly disclaim as to any of the waters of the river, but they set up their right as riparian proprietors, alleging that as such they

were entitled to a reasonable proportion of the waters, and that two irrigating heads constituted such reasonable proportion, and they rely upon the former recovery as a definitive determination of their right to that amount of water. The defendants' title to that amount of water was distinctly put in issue in the former action, and was tried and determined, and was determined in their favor. The record presents the question, whether the finding in that regard is sustained by the evidence; but it is unnecessary at this time to inquire into the source, nature or extent of the right or title of the city to the waters of the river, for whatever may be the facts in those respects, the judgment in favor of the defendants must be construed only as a determination that as against the city the defendants are entitled to appropriate and use two "irrigating heads" of the waters of the river. That finding is, in our opinion, fully sustained by the evidence, the most material portions of which have been recapitulated.

In that action the plaintiff sought a recovery on the distinct ground of title, and claimed damages for the diversion of the water, and an injunction to restrain its further diversion, on the ground of the exclusive right in the plaintiff to appropriate and use all the waters of the river. The defendants based their claim to divert and appropriate the waters, not only on a denial of the plaintiff's right, but also on the ground that they possess the right as riparian proprietors, and had acquired the title by adverse user or prescription. The Court did not find what title or right, in or to, the waters the plaintiff possessed; but it distinctly found that the defendants were entitled, as riparian proprietors, to the amount of water appropriated by them, and that they had been in continuous adverse use and enjoyment of the same for more than the period of the Statute of Limitations. In ordinary controversies between parties claiming only as riparian proprietors on the same stream of water, a judgment determining that at a given time the parties are entitled to appropriate the waters in certain proportion, is not necessarily conclusive in a subsequent action, for the facts upon which the determination as to the proportion of the waters to which

the parties are entitled may be materially different at the second trial. The judgment may have been given on the ground that, notwithstanding the diversion complained of, the plaintiff may have been in the enjoyment of all the water he could use, or that the defendant diverted water for which he had no need in connection with his lands. In other words, where the parties claim merely as riparian proprietors, the proportions to which they may respectively be entitled may vary from time to time, in accordance with the facts existing at the respective times. But the right which one party possesses, or some portion thereof, may be transferred to another, so that the latter may hold it absolutely, as against the former, without regard to any rule of equitable apportionment as between riparian proprietors. Prescription, which proceeds on the presumption of a grant, will as effectually vest the right which has been held adversely, as an express grant of such right. In the former action, the Court found in favor of the defendants upon the issue of adverse possession—which as applied to running waters is denominated prescription—to the extent of “two irrigating heads,” and that finding, and the judgment thereon, is conclusive in this action, in respect to the same amount of water—that being the amount, or proportion, of water which is claimed in this action by the defendants. It has that effect under the operation of the rule applicable to judicial proceedings, that the determination of a material fact directly involved and actually put in issue in an action, is conclusive between the same parties in any future litigation directly involving the same fact.

In view of the effect here given to the finding and judgment in the former action, it would be useless, as already said, to attempt to ascertain or define the source, nature or extent of the right claimed or enjoyed by the pueblo or the city; for the decision in those respects would bind neither the city nor any other persons with whom the city may have controversies concerning the right to the use of the waters of the river.

In my opinion the judgment and order should be affirmed.

RHODES, J.

[No. 5,862.]

[Filed April 3, 1879.]

COBURN, PLAINTIFF AND RESPONDENT,

VS.

SMART, *et al.*, DEFENDANTS,

AND

HEARST *et al.*, INTERVENORS AND APPELLANTS.

1. The sureties of a defendant, in an action of replevin, upon an undertaking given to effect a return of the property in controversy to the defendant pending the action, have an interest in the action which entitles them to intervene if the defendant is insolvent and the action is not being defended in good faith.
2. The right to intervene may be exercised at any time before the trial of the action is commenced—if the complaint in intervention tender only such an issue as is already joined by the answer of the defendant on file.
3. Sureties, whose application to intervene in such a case, has been denied, may prosecute an appeal to this Court.

Appeal from Twelfth District Court, county of San Mateo.

Craig & Meredith, Attorneys for Appellant.

G. W. Fox, Attorney for Respondent.

WALLACE, C. J., delivered the opinion of the Court.

The plaintiff, Coburn, brought this action, in replevin, against Smart, the defendant, for the recovery of a large quantity of lumber, and, at the time of the issuance of the summons, he delivered to the Sheriff an affidavit, notice and undertaking, as provided by sections 510, 511 and 512, of the Code of Civil Procedure, in proceedings by a plaintiff for claim and delivery of personal property. Thereupon, the Sheriff took the lumber from the possession of Smart, and the latter, for the purpose of procuring its return to him, pending the action delivered to the Sheriff a written undertaking, executed by the intervenors, Hearst and Pearson,

as sureties thereon, to the effect that they were bound in double the value of the property in controversy for the delivery of the lumber by the defendant to the plaintiff, if such delivery should be subsequently adjudged, and for the payment to the plaintiff of such sum as might, for any cause, be recovered against the defendant Smart, as provided by section 514 of the same Code. The defendant filed an answer denying the allegations of the complaint, and the cause was set down for trial on the 5th day of June, 1877, on which day, and before the calling of the cause on the calendar, Hearst and Pearson appeared and presented to the Court their complaint in intervention, and asked leave to file the same, which was refused by the Court. The trial of the cause was then proceeded with, and resulted in an alternative judgment in the usual form, in favor of the plaintiff and against the defendant Smart, for the return of the lumber in controversy, or its value if return could not be had. From this judgment, and from the order refusing their proposed intervention, Hearst and Pearson bring this appeal. In their complaint in intervention offered in the Court below, Hearst and Pearson set forth the proceedings in the action by which they became the sureties of Smart, and alleged that the latter is insolvent and unable to pay any judgment which the plaintiff might obtain against him. and that Smart was actually in collusion with the plaintiff Coburn in the conduct of the action, and was not making a *bona fide* defense therein, but proposed and intended to suffer a judgment to be entered against him and in favor of Coburn, as prayed for in the complaint; and, also, that the proposed intervenors had, since the commencement of the action, purchased from the defendant Smart about 18,000 feet of the lumber in controversy in the action, and were then in the possession of the same.

1. The interest of Hearst and Pearson in the success of the defendant is apparent, for by the judgment, if any, to be rendered against Smart, they would not only be concluded as to their title to the 18,000 feet of lumber purchased by them of Smart *pendente lite*, (*Brooks vs. Häger*, 5 Cal. R., 283,)

but their liability upon the undertaking given by them in behalf of Smart would become fixed.

2. Nor do we think that the intervention should have been denied, because the application to intervene was not made at an earlier stage of the controversy. The statute permits the intervention to be made at any time before the trial. "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation," etc. (*Code of Civil Procedure*, Sec. 387.) Besides, no objection was made below on the ground that the application was too late; the only objection was, that the intervenors "did not show any right to intervene." The intervention in this case, though made at the last moment of time permitted by the statute, need not have delayed the cause. It presented, in reality, no new matter which would have required further preparation on the part of the plaintiff Coburn. The only portion of the complaint in intervention which concerned him was its general denial of the title of the plaintiff to the lumber in controversy, and this was but a repetition of the general denial in the answer of Smart, already on file, and which the plaintiff was bound to meet and overcome, if the pending controversy between himself and Smart was real and not collusive. We are of opinion that the Court below erred in refusing to permit the proposed intervention.

3. It is claimed, however, by the respondent, that notwithstanding the error of the Court below in the disposition of this cause, the intervenors cannot, under the Code of Civil Procedure, become appellants in this cause. The intervenors have appealed from the judgment rendered in form against Smart in favor of the plaintiff, and, also, from the order and judgment denying and refusing their application to intervene in the cause. "Any party aggrieved may appeal," etc., (*Code of Civil Procedure*, Sec. 938,) "from a final judgment," etc., (*Id.*, Sec. 939.) That these appellants are "aggrieved" by the judgment rendered against Smart has been seen already, and by "final judgment," for they are concluded by the judgment against Smart, not only as to the personal property bought by them of him *pendente lite*,

but as to their liability as sureties upon the undertaking given in his behalf. That they are "parties" to the action is equally clear. Their motion to be permitted to intervene, its refusal and their exception, has made them parties to the record in the technical sense, entitled as such, to prosecute an appeal. (*People vs. Grant*, 45 Cal. R., 97.)

The respondent has, since the argument, placed on file his consent that the judgment given below be modified here by excepting therefrom the lumber purchased of Smart by the appellants; but it is obvious that this would not relieve the latter, as the sureties of Smart, for the return of the remainder of the property recovered in this action.

Judgment against Smart, and judgment and order denying the appellant's leave to intervene reversed, and cause remanded for further proceedings.

We concur:

McKINSTRY, J.

NILES, J.

I dissent:

RHODES, J.

[No. 5,863.]

The judgment against Smart, and judgment and order denying the application of Hearst and Pearson to be permitted to intervene in the action are reversed, and the cause remanded for further proceedings, upon the authority of *Coburn vs. Smart, Hearst et al.*, Interveners, (No. 5,862,) decided at the present term.

WALLACE, C. J.

We concur:

McKINSTRY, J.

NILES, J.

[No. 5,864.]

[Filed April 3, 1879.]

The judgment against Smart, and judgment and order

denying the application of Hearst and Pearson to be permitted to intervene in the action are reversed, and the cause remanded for further proceedings, upon the authority of *Coburn vs. Smart, Hearst et al.*, Intervenor, (No. 5,862,) decided at the present term.

WALLACE, C. J.

We concur :

McKINSTREY, J.

NILES, J.

[No. 6,051.]

[Filed April 5, 1879.]

FARMERS & MERCHANTS' BANK OF LOS ANGELES,
PLAINTIFF AND RESPONDENT,

VS.

DOWNEY, DEFENDANT AND APPELLANT.

1. The directors of a corporation act in a fiduciary capacity and are trustees of the stockholders.
2. Courts of Equity will not permit them, in the exercise of their duties as Directors, to make a profit for themselves, to the exclusion of the other stockholders.
3. Therefore, where the defendant, a director of a bank, loaned the moneys of the bank and took from the borrowers a note, running to the bank, for the principal sum loaned, at a rate of interest therein stipulated, but at the same time, and as part of the same transaction, made an agreement with the borrowers that they should permit the defendant to participate with them in the profits of a purchase and sale of certain lands—HELD: that the defendant could not be permitted to retain for himself the profits thus contracted for, but must surrender them to the bank to be participated in by all the stockholders.

Appeal from Seventeenth District Court of Los Angeles County.

Brunson, Eastman & Graves and John R. McConnell, Attorneys for Appellant.

Glassell, Chapman & Smiths, and Thom & Ross, Attorneys for Respondent.

WALLACE, C. J., delivered the opinion of the Court.

The complaint filed in this action seeks to charge the defendant, John G. Downey, as trustee of the plaintiff, touching the benefits secured to the defendant by the terms of a certain contract between the latter, and Melchert and Linderfeldt.

The circumstances appearing are, that these persons had purchased the "*Wilhart tract*" of land situate in the city of Los Angeles, upon which they had payments to make. They had also agreed to sell a portion of the same tract to the "Pioneer Building Lot Association of East Los Angeles," at a considerable advance upon the price they had agreed to pay to the Wilharts. In order to provide themselves with money to pay to the Wilharts they applied to Childs, who was one of the directors of the banking corporation, plaintiff here, but without success. At the instance of Melchert and Linderfeldt, Childs brought the matter to the attention of the defendant, who was another director of the banking corporation, plaintiff here, and at the time acting as its President, and these two agreed to furnish the sum required, upon condition that they should become personally interested in the sale to be made to the Pioneer Building Lot Association, to the extent of one third of the net profits. The loan was accordingly made, and a note therefor taken, bearing interest at the rate of one and one quarter per cent. per month, running on its face to the bank, and executed by Melchert and Linderfeldt as makers. The bank subsequently, and upon ascertaining the existence of this agreement, claimed to be entitled to its benefits, and demanded of Childs and the defendant Downey that they assign to it the agreement and all benefits derived, or to be derived, thereunder.

Childs complied with the demand, and executed the required assignment, but the defendant refused, whereupon this action was brought. The Court below gave judgment for the plaintiff in accordance with the prayer of the complaint, from which judgment, and from an order, subsequently entered denying his motion for a new trial, the defendant has brought this appeal.

- The controversy between the parties involves the right to the one sixth of the profits of the land transaction already referred to. These profits constitute the bonus which the defendant attempted to secure to himself to the exclusion of the other stockholders, in making the loan of the money of the bank.

Upon well settled principles governing Courts of Equity, the defendant cannot be permitted to retain these profits for himself. They constitute part of the consideration which the borrowers paid, or agreed to pay, in obtaining the loan, and are as clearly the property of the corporation, as is the interest accrued and stipulated to be paid, on the face of the note itself. In making the loan, the defendant was acting as a director—the president—of the corporation, plaintiff here. He was its *trustee*. "The officers and directors of a corporate body * * * * are trustees of the stockholders, and cannot, without being guilty of fraud, secure to themselves, advantages not common to the latter." (*Bigelow on Fraud*, p. 248, and cases cited in note.)

- This is the well settled rule and the general language of the authorities. In *Kochler vs. Black River Falls Iron Company*, (2d Black R., 721,) the Supreme Court of the United States say: "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of a Court of Equity, be suffered to pass without a remedy."

The law will not permit them to make a private profit for themselves in the discharge of their official duties, and as observed by the Court of Appeals of the State of New York in (*Bow vs. Brown*, 56 N. Y. R., 288): "When agents and others, acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will

conclude that it is useless to exercise their wits in contrivances to evade it."

Judgment and order affirmed.

Remittitur forthwith.

We concur:

NILES, J.

RHODES, J.

McKINSTRY, J.

[No. 5,549.]

[Filed April 4, 1879.]

DE FREMERY *et al.*, RESPONDENTS,

vs.

AUSTIN, APPELLANT.

A threat by the Tax Collector to seize and sell property, by virtue of a delinquent list, to satisfy an illegal tax, amounts in law to coercion.

If the tax levy contains an illegal item, such item will not invalidate the levy as to other items, if the levy is so made that the illegal item may be separated from the other items of the levy.

In case of a payment of the whole tax, a protest is not sufficient unless it specifies such illegal item among the grounds of illegality of the tax.

Appeal from the Fifteenth District Court, city and county of San Francisco.

W. C. Burnett, Attorney for Appellant.

A. & H. C. Campbell, Counsel for Respondents.

PER CURIAM.

The tax in this case was paid on the 25th day of February, 1873, after the delinquent list had been issued to the Tax Collector, giving him authority to seize and sell property, and, therefore, the case does not come within the doctrine of *Williams vs. Corcoran*, 46 Cal., 553.

The tax upon the item of solvent debts, \$25,000, is illegal. The State tax upon the other items is also illegal, upon the grounds stated in *Wills vs. Austin*, No. 5,545. The tax for city and county purposes, upon the last mentioned items, is, to some extent, valid. If it be conceded that certain items

of the tax levy made by the Board of Supervisors—as, for instance, for the Sinking Fund bonds of 1855, or the Sinking Fund bonds of 1858—are invalid, their invalidity does not effect the levy for other items, such as that for the General Fund or the School Fund. The whole amount levied is apportioned to the several funds mentioned in the order fixing the rate of taxation for city and county purposes—a specified amount being apportioned to each fund—and the tax charged against the property, for any one of those funds—as for instance, \$0.01.08 upon each \$100, for the Sinking Fund bonds of 1855—may readily be separated from the entire levy of \$1 upon each \$100, and would not invalidate the levy for the General Fund, or any other fund.

The protest in this case does not specify any ground of illegality of the taxes. It was not necessary for the plaintiffs to specify the illegality of the tax upon the solvent debts, or of the State tax upon the other property, for the Tax Collector is chargeable with notice of their illegality; but if they desired to recover back any portion of the tax on the ground that the levy for certain of the funds specified in the order of the Board levying the city and county tax was illegal, they should have specified the grounds of the alleged illegality of the tax, for there is nothing in the case showing that the Tax Collector was chargeable with notice of the alleged illegality. (*Meek vs. McClure*, 49 Cal., 628.) The plaintiffs, for that reason, were not entitled to recover back the money paid for city and county taxes on the property other than the solvent debts.

Judgment and order reversed, and cause remanded for a new trial, unless the plaintiffs shall, within twenty days, remit the amount of the recovery for the city and county taxes paid upon the property other than the solvent debts, but if such amount shall be so remitted, then the judgment and order shall be affirmed as of the day of the submission of the cause.

Remittitur forthwith.

(Mr. Chief Justice WALLACE did not express any opinion in this case.)

[No. 5,546.]

[Filed March 28, 1879.]

MERRILL *et als.*, PLAINTIFFS AND RESPONDENT,

vs.

AUSTIN, TAX COLLECTOR, DEFENDANT AND APPELLANT.

The payment to a Tax Collector of the amount of a tax, made before the tax was returned delinquent was *voluntary*, although accompanied by a protest in form, and the amount so paid cannot be recovered back.

Appeal from Fifteenth District Court, city and county of San Francisco.

W. C. Burnett, Attorney for Appellant.

George. B. Merrill, Attorney for Respondents.

PER CURIAM.

The payment under protest was made on the 2d day of January, 1873, and before the tax (which was on personal property alone) was returned delinquent. Until the tax became delinquent, the plaintiff was not under such legal coercion as compelled the payment in order to save the collection of the amount by sale of his real property, or otherwise. The payment was a voluntary payment, because the defendant was not then in a position to enforce the collection by a sale of plaintiff's property. (*Williams vs. Corcoran*, 46 Cal., 556; *Bank of Woodland vs. Webber*, January Term, 1877, and other cases.)

Judgment and order reversed as of the day of the submission of the cause.

Remittitur forthwith.

[No. 6,139.]

[Filed April 5, 1879.]

WATSON, RESPONDENT,

vs.

ROGERS, APPELLANT.

Under the provisions of Section 3440 of the Civil Code, declaring a transfer of personal property made by a person having at the time the possession or the control thereof, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession thereof, to be fraudulent, and, therefore, void, against those who are his creditors while he remains in possession, such creditors may cause the property to be seized under legal process, as the property of the debtor, although it may be in the possession of the transferee.

RHODES, J., delivered the opinion of the Court.

It appears, from the findings, that the property in controversy was owned by J. D. Watson, the plaintiff's father, and was in his possession; that in 1871 he gave a portion of it to the plaintiff, and within two years thereafter he sold another portion to him, but there was no delivery of the possession of any of the property until September, 1876, when the plaintiff removed the larger portion of it from the rancho of the plaintiff's father to a rancho of which the plaintiff had the possession; that at that place the property was attached on the 4th day of October, 1876, by the defendant, acting as the Sheriff, under a writ issued in an action instituted by Paulsell against J. D. Watson, upon a promissory note made in 1874, becoming due on the 1st day of October, 1876. Judgment was thereafter rendered in that action in favor of Paulsell. The question presented for decision is, whether this property was liable to seizure under that attachment, as the property of J. D. Watson.

The Civil Code, Sec. 3440, provides that "every transfer of personal property other, etc., * * * is conclusively

presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and, therefore, void, against those who are his creditors, while he remains in possession," etc. Paulsell was a creditor while J. D. Watson remained in the possession of the property, and that brings the case within the provision of the Code, declaring the transfer fraudulent and void as to him. The Code does not limit the creditor to a seizure while the property remains in the possession of the person attempting to make a transfer of it, but its effect is to make the attempted transfer fraudulent, and, therefore, void, as against demands of a person who was a creditor during the time. It is claimed by the plaintiff, that the Code only makes the sale void during the time that the property remains in the possession of the vendor, and thus subjects it to seizure during that time. But that is not the correct construction of the provision of the Code. It denounces the transfer as fraudulent and void, as against the claims of a creditor, who is such creditor during any of the time that the person who made the transfer remains in possession, after a transfer which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession. Such a transfer being void as to the creditor, he may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor. It results from this construction that all of the property was subject to seizure at the suit of Paulsell, the creditor of J. D. Watson.

Judgment reversed, and cause remanded, with directions to render judgment for the defendant for all the property in controversy.

We concur:

WALLACE, C. J.

McKINSTRY, J.

NILES, J.

Pacific Coast Law Journal.

VOL. 3.

APRIL 19, 1879.

No. 8.

Current Topics.

THE *California Legal Record*, formerly published in this city, has ceased its publication, in behalf of the JOURNAL. We have now the only legal publication on the coast, and adding the further support which has heretofore been extended to the *Record* to our already much increased circulation, we become placed in a position which will justify us in increasing the size and matter of the JOURNAL with our next volume.

WE call attention to the opinion by the Supreme Court of the United States, in the case of *Grafton vs. Cummings*, appearing in this issue. The construction there given to the statute of frauds of New Hampshire will at once be seen to be applicable to the statute of our State respecting the sale of real estate. The Court say: "The memorandum in writing necessary to make a valid contract within the meaning of the statute of frauds, though signed by the defendant and describing with sufficient distinctness the property sold, and the consideration to be paid, is not sufficient to sustain an action, unless the other party to the agreement is either named in the memorandum or so designated in some paper signed by the defendant that he could be identified without parol proof."

THE Secretary of the Interior has just held in the case of *Smith vs. Van Clief* that: 1. A mine can only be re-located after forfeiture, and no forfeiture can take place until the expiration of one year after entry. 2. It sometimes occurs, where lands are acquired under the pre-emption laws, that the legal title may be vested in one, and a superior equity in another, but this cannot occur under our mining laws. 3. There is nothing in the laws which requires a party in possession to purchase land from the government, and if he complies with the laws of possessory right, his title is as good for all practical purposes as if secured by patent. 4. The true law governing mineral lands is, that when the purchase

is completed, and the certificate issued, the purchaser at once acquires a vested right, of which he cannot be subsequently deprived, and the land ceases to be a part of the public domain. There is a part performance of the contract, which entitles the purchaser to the specific performance of the whole, without further action on his part. An entry made is equivalent to a patent issued.

THE *Solicitors' Journal* says: "The bill permitting any woman, who shall have been a member of the bar of the highest Court of any State or Territory, or of the Supreme Court of the District of Columbia, for three years, and shall have maintained a good standing, and who shall be of good moral character, to be admitted, on motion and the production of the record, to practice in the Supreme Court of the United States, has become law. A bill has, also, been introduced into the Pennsylvania legislature, providing 'That no person shall be refused admission as an attorney in any Court of Law or Equity in this Commonwealth on account of sex.' Nor is London to be without its ladies learned-in-the-law. We understand that a series of drawing-room meetings are being there organized to discuss laws affecting women. These meetings are designed to encourage amongst women the study of the laws of their country, and thus enable them to acquire that knowledge which every citizen is by law assumed to possess, and the absence of which leads to many practical difficulties in the conduct of life, and also to give them a wider and more intelligent interest in the legislation of their country, and in all matters affecting the welfare of the community. The first meeting was held last month, and the topic was the custody of children (Agar-Ellis case.) Will our learned sisters be content with knowledge without practice? Will they long remain satisfied with exclusion from the legal profession in this country, notwithstanding that, as an American senator was pleased to observe, 'The greatest master of human manners who read the human heart, and who understood better than any man who ever lived the varieties of human character, when he desired to solve the knot which had puzzled the lawyers and doctors, placed a woman upon the judgment seat.' "

Supreme Court of California.

JANUARY TERM, 1879.

[No. 6,143.]

[Filed April 5, 1879.]

THOMAS, PLAINTIFF AND RESPONDENT,

vs.

LAWLOR, DEFENDANT AND APPELLANT.

A person who purchased land from the State, and whose application to purchase contains false statements as to the occupation of the land and the improvements thereon, and an adverse claim of title thereto, will not, on that ground, be held in equity to have taken the title in trust for the person who was then in possession of the land, and had improvements thereon, claiming title under a Mexican grant, but who did not make application to purchase from the State, but applied, under the Act of Congress of July 23, 1866, to purchase the land from the United States.

In an action of ejectment, after the equitable defense is dismissed, the Court should proceed to the trial of the issues at law.

Appeal from Seventeenth District Court, Los Angeles County.

A. J. King and Glassell, Chapman & Smiths, Attorneys for Appellant.

R. M. Widney, Attorney for Respondent.

PER CURIAM.

The action was brought for the recovery of the possession of a tract of land. The answer denies that the plaintiff is the owner, or entitled to, the possession of the land, and it also sets up the Statute of Limitations. It also avers, certain facts as the basis for equitable relief, and prays that the plaintiff be adjudged to convey the lands to the defendant.

The facts upon which the claim to equitable relief is based are in substance as follows: The lands are within the limit of the lands claimed by the city of Los Angeles, and while they were so claimed the city conveyed the same to Car-

penter, a remote grantor of the defendant. The patent afterward issued by the United States to the city, in pursuance of the decree of confirmation, did not include the land in controversy. Carpenter, and those claiming under him, have been in the continuous occupation of the land, having improvements thereon from 1865 to the commencement of this action. The plaintiff has filed two applications in the United States Land Office; one before, and the other after, the commencement of this action, to purchase the lands under the Act of Congress of July 23, 1866, which are still pending, but he has made no application to purchase the same from the State.

Application was made by Hazard, in 1868, to purchase the land from the State, and in pursuance of his application a patent was issued to him by the State; and the title thus acquired afterward vested in the plaintiff. It is alleged, that the application of Hazard falsely stated that the land was unoccupied except by him, and that there were no improvements thereon other than his own, and that there was no valid claim existing to the land adverse to his own; when, in fact, Hazard well knew that the defendant's grantor was in occupation of the land, having improvements thereon, and claiming the land. It is also alleged, that the plaintiff, and all those through whom he claims title from the State, had full notice of the rights and claims of the defendant to the land, and of those under whom he claims; and the defendant offers to pay the plaintiff the money paid by him for the land.

From these facts, no trust will be implied, in favor of the defendant or his grantor, against the plaintiff or his grantors. Should the defendant succeed in his application to purchase the land from the United States, and should it be shown that the land was improperly listed to the State, he will prevail upon his legal title, and there would be no ground upon which he could invoke the aid of a Court of Equity to compel a conveyance from the plaintiff. If his claim to relief in equity is dependent in any degree upon his success in his application to purchase from the United States, it is obvious

that he is not now entitled to such relief, for the question, whether he is entitled to make the purchase, is to be determined by the Land Department of the United States, and not by the Courts of this State.

Neither the defendant, nor his grantors, made application to purchase the land from the State, nor is it averred, that at any time they had a better right than Hazard, or any right, to make such purchase; and there is nothing in the answer showing any acts on the part of Hazard by which they were prevented from making such application.

The respective parties proceeded in different modes to acquire the title to the land; the facts upon which they must rely, may be essentially different in the respective applications; and they seek to acquire the title from different sources. The one application bears no relation to the other, and the false statements in the one affords no ground upon which the other applicant can claim that he first acquired the title from one source of title in trust for the other applicant, who was seeking to acquire the title from another source. The defendant was not entitled to any relief upon his alleged equitable defense, and it should have been dismissed.

The alleged errors, whether of law or fact, respecting the verdict of the jury upon the special issues submitted to them, need not be noticed in detail, for the reason, that the defendant is not entitled to any relief in equity upon his alleged equitable defense. The Court should have dismissed the equitable defense, and then have proceeded to the trial of the issues in the legal branch of the case. The issues as to the plaintiff's title and right to the possession of the land, and those arising upon the answer of the Statute of Limitations, were not comprised in the special issues submitted to the jury, nor have the Court or jury found upon those issues. It was erroneous to render judgment for the plaintiff without a verdict or finding on those issues.

Judgment reversed, and cause remanded, with directions to dismiss the equitable defense, and proceed to try the remaining issues in the action.

[No. 6,204.]

[Filed April 8, 1879.]

STEVENS, PLAINTIFF AND RESPONDENT,

VS.

CARDONA *et al.*, DEFENDANTS AND APPELLANTS.

1. A mortgage contains this stipulation: "If default shall be made in the payment of the said sum of money, or any part thereof, as provided in said note, or if the interest that may grow due thereon, or any part thereof, shall be behind and unpaid for the space of sixty days after the same should have been paid, according to the terms of said promissory note, then, and from thenceforth, it shall be optional with said party of the second part, his executors, administrators and assigns, to consider the whole of said principal sum expressed in said note, as immediately due and payable, although the time expressed in said note for the payment thereof shall not have arrived, and immediately to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all benefits and equity of redemption of the said parties of the first part, their heirs, executors, administrators or assigns, according to law; and out of the money arising from such sale to retain the principal and interest," etc. And also the following: "The parties of the first part further stipulate and agree, to pay the interest on said note, and this mortgage, on or before the 5th day of each month, during the existence of this mortgage, to E. N. McDonald, who has been appointed by said party of the second part, his agent, for the purpose of receiving said interest; and in the event of the failure of the parties of the first part to pay said interest to said McDonald on or before the 5th day of each month as aforesaid, then, and in that case, the parties of the first part agree that said McDonald shall take charge of the property hereby mortgaged, and collect the rents thereof, and deduct therefrom the amount of said interest, paying the remainder, if any, to the parties of the first part." Held, that the two stipulations do not necessarily conflict one with the other.
2. Although by a provision of the mortgage it was covenanted that in case the mortgagor did not keep the property fully insured, or did not pay all taxes and assessments, the mortgagee might pay the same and have his lien therefor with interest, yet the agent named in the second of the stipulations was not authorized to pay such taxes, or assessments, or premium insurance, or make other like expenditures out of the rents received, and thereby, perhaps, reduce the amount received as rents below the interest to be paid on the note and mortgage, and set running the sixty days mentioned in the first of the stipulations.

Appeal from Seventeenth District Court of Los Angeles County.

F. S. Ramirez and Bicknell & White, Attorneys for Appellants.

Thom & Ross, Attorneys for Respondent.

McKINSTRY, J., delivered the opinion of the Court.

The stipulation in the mortgage, that in case of default in the payment of interest, on or before the 5th of any month, to McDonald, agent, he should take charge of the mortgaged premises, collect the rents, deduct interest, and pay excess to mortgagor, does not necessarily conflict with the previous stipulation, that in default of payment of interest for a period of sixty days, the mortgagee might consider the principal sum due and foreclose.

By the stipulation first mentioned, if the mortgagor failed to pay interest, or any part thereof, on the 5th of any month, McDonald would have the right to collect the rents and apply the same to the payment of interest. McDonald might pay out of the rents received such sums as by the contracts between the mortgagor and the tenants in possession were to be paid by the former, but he was not authorized to pay taxes or make other expenditures *merely* because the mortgagee, by the terms of the mortgage, had the right to make them (and to have his lien therefor) in case they were not paid by the mortgagor. To construe the stipulation as authorizing the agent, McDonald, to make such expenditures, would be to construe it as authorizing him to pay such sums as would, perhaps, reduce the rents received, so that they would be insufficient to meet the interest, and thus set the sixty days running contrary to the meaning and intent of the covenants of the mortgage.

Judgment and order reversed, and cause remanded for a new trial.

We concur:

WALLACE, C. J.

RHODES, J.

[No. 6,244.]

[Filed April 8, 1879.]

O'CONNOR, PLAINTIFF AND APPELLANT.

VS.

FRASHER *et al.*, DEFENDANTS AND RESPONDENTS.

1. A pleading on the part of a defendant not showing what portions of it are intended as a legal defense to a complaint in ejectment, and what portions intended as a cross-complaint, will be held bad on demurrer for ambiguity.
2. *Coveny vs. Hale*, (49 Cal., 552,) and *Thomas vs. Lawlor*, (present term,) affirmed.

Appeal from Seventeenth District Court of Los Angeles County.

John D. Bicknell, Attorney for Appellant.

Gould & Blanchard, Attorneys for Respondents.

PER CURIAM.

The demurrer to the defendant's pleading should have been sustained. It is impossible to determine, from the face of the pleading, what portion of it was intended to constitute a legal defense to the cause of action averred in the complaint, and what portion was intended as a cross-complaint.

Treating the whole pleading as a cross-complaint, the demurrer should have been sustained. (*Thomas vs. Lawlor*, No. 6,143, present term.)

Finally, even if we were authorized to say, that the denials (separated from the other matter) made issues at law, the Court did not find upon such issues, but only found probative facts which were not necessarily conclusive of such issues. *Coveny vs. Hale*, (49 Cal., 552.)

Judgment and order reversed, and cause remanded for a new trial.

Supreme Court of the United States.

OCTOBER TERM, 1878.

[No. 179.]

JOSEPH GRAFTON, PLAINTIFF IN ERROR,

VS.

STEPHEN H. CUMMINGS.

The memorandum in writing necessary to make a valid contract within the meaning of the statute of frauds, though signed by the defendant and describing with sufficient distinctness the property sold, and the consideration to be paid, is not sufficient to sustain an action, unless the other party to the agreement is either named in the memorandum or so designated in some paper signed by the defendant that he could be identified without parol proof.

In error to the Circuit Court of the United States for the Southern District of New York.

Mr. Justice MILLER delivered the opinion of the Court.

On the 16th day of May, 1871, the hotel known as the Glen House, at the foot of the White Mountains, in New Hampshire, together with its furniture, was bid off at an auction sale by Grafton, the plaintiff in error, at the price of \$90,000. At the end of the ten days allowed by the terms of the sale for examination of the title, three deeds were tendered him, which were supposed to convey the title. He refused to accept the deeds, or to pay the purchase money, or otherwise complete the contract of purchase. The property was again advertised for sale, and sold for \$61,000, and the present suit was brought to recover the difference in the amounts for which the property sold at these two sales, as damages for failure to perform the first contract. The suit was brought in the Circuit Court for the Southern District of New York, and a verdict and judgment recovered against Grafton, to which he prosecutes this writ of error.

The bill of exceptions is voluminous, containing apparently everything said and done on the trial. Sixty-one errors are assigned in this Court.

We shall confine ourselves to the examination of one of them. That one presents the question, as it occurs in various forms in the record, whether there was a sufficient memorandum of the contract in writing, under the statute of frauds of New Hampshire, to sustain the action. That statute is in these words: "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing." The agreement given in evidence on the trial by Cummings, the sole plaintiff, consisted of a paper in writing, signed by Grafton, certain printed matter on the margin of that writing, and the advertisement mentioned in the writing so signed. They are as follows:

"I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with furniture belonging to it, in Green's grant, New Hampshire, and sold at auction Tuesday, May 16th, 1871, at 11 o'clock A. M., and for the sum of ninety thousand dollars, the said property being more particularly described in the advertisement hereunto affixed; and I hereby bind myself, my heirs and assigns, to comply with the terms and conditions of the sale, as declared by the auctioneer at the time and place of sale.

"JOSEPH GRAFTON."

Upon the margin of said agreement were written and printed the following:

"TERMS OF SALE.

"Ten days will be allowed to examine the title, within which time the property must be settled for. \$5,000 will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed, and one-half of the purchase money to be paid Sept. 1, 1871, the remaining balance to be paid Sept. 1, 1872.

"The property is sold subject to the conditions of the sale of the stage route, stages, &c., which are, that the proprietors of the route shall have the exclusive business of the house."

The advertisement referred to in the foregoing paper as being thereunto affixed, was as follows:

"GLEN HOUSE AT AUCTION.

"The famous summer resort, at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill and out-buildings, will be sold at public auction at Gorham, N. H.; Tuesday, May 16, 1871, at 11 o'clock A. M.

"May 2d, 1871.

"VALUABLE HOTEL PROPERTY FOR SALE.

"The favorite summer resort, known as the Glen House, situated at the foot of Mount Washington and at the commencement of the carriage road to the summit, will be offered for sale, together with the land, containing about one thousand acres (well timbered,) all the out-buildings, stables and mill on the same, also the furniture, staging, mountain carriages, horses, &c. The house contains some two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The whole property, if not disposed of at private sale previous to the first of May, will be sold at public auction to close the estate of the late J. M. Thompson. Notice of the time and place of sale will be given hereafter. Any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine."

The bill of exceptions adds, that when this paper was put in evidence it was endorsed "A. R. Walker, auctioneer and agent for both parties." It is not satisfactorily shown when this endorsement was made, and there is some evidence to show that it was not there at the time the deeds were

tendered, and Grafton refused to accept them. The Court, however, instructed the jury that if it was done at any time before the commencement of this action it was sufficient.

Evidence was admitted to show that at the time of the sale another paper was read by the auctioneer affecting the terms of the sale, but as this was not among the papers subscribed by defendant, we will first consider whether these were sufficient to sustain the action.

It is proper to observe that the objection to these papers is not that they were *not signed by Grafton, the party charged*, for he signed himself the principal instrument, and the reference to the others, and their annexation to that, are sufficient to make them a part of the paper which he did sign. We shall, also, for the purpose of this inquiry, take it that Walker was the auctioneer, and that his name endorsed on the instrument gives it all the value which it could have if signed at any time necessary for that purpose.

The distinct objection to the instrument, as so presented, is that the other party to the contract of sale is not named in it, and can only be supplied by parol testimony.

The statute not only requires that the agreement on which it is brought, or some memorandum thereof, shall be signed by the party to be charged, but that *the agreement or memorandum shall be in writing*. In an agreement of sale there can be no contract without both a vendor and vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If Grafton was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and to deliver the consideration for the price so paid.

There can be no bargain without two parties. There can

be no valid *agreement in writing* without these parties are named in such manner that some one whom he can reach is known to the other to be bound also. No one is bound in this paper to sell the Glen House, or to convey it. No one is mentioned as the owner, or the other party to this contract. Let it be understood that we are not discussing the question of mutuality in the obligation, for it may be true that if a vendor was named in this paper, the offer to perform on *his* part would bind the party who did sign. But Grafton did not agree to buy this property of *anybody* who might be found able and willing to furnish him a title. He was making a contract which required a vendor and vendee at the time it was made, and he is liable only to *that* vendor. The name of that vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part* of that instrument to its validity.

It is alleged that Stephen H. Cummings, the plaintiff in this action, was the vendor, and that this sufficiently appears in the papers of which we have given copies.

The first ground on which it is sought to maintain this proposition is, that Walker's endorsement is sufficient for that purpose.

It is very clear that Walker did not intend to hold himself out as the vendor in this case, because he describes himself as auctioneer and agent for both parties. If he had been sued on this contract by Grafton for failing to tender sufficient deeds of conveyance, it would have been a good answer to the action that he describes himself in the paper on which he was sued as merely an auctioneer in the matter, and in that sense as agent, and not principal. He could not, in the act of signing that paper, be the agent of Grafton, for Grafton signed it for himself. The statement, therefore, did not mean that he *signed* for both parties, because he did not, and could not, sign as agent for Grafton.

What did he mean by putting his name there? It can have no *other fair* meaning than simply to say, as he does, I was the auctioneer who struck off this property.

But concede that he meant to represent the other party in that contract, a contract in which he takes care not to bind himself, who is that other party? What light does the writing of his name, as auctioneer and agent, throw on that question? Literally none. An anxious reader of the whole paper and its attachments would know as little who sold, or for whom Mr. Walker was selling, after his signature, as he did before. To say agent for both parties may show he was agent for the one party whose name is not there, but it does not show who was that party. The paper, without Walker's endorsement, shows who was the purchaser, but neither with, nor without it, does it show who was the seller.

It is next argued, that the reference to Cummings' name in the advertisement annexed to the paper, signed by defendant, is sufficient for this. The statement is, that the sale is made to close out the estate of the late Mr. Thompson; and "any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine." Three persons are here mentioned. One, Mr. Thompson, was dead, and could not be the vendor. Another, Mr. Weeks, though not mentioned as a party selling, it may be inferred, had some interest in the sale as administrator of Thompson. But Weeks does not sue, and if his name had been inserted in the contract as vendor, it would not have sustained the present action. But the true intent of that advertisement was not to describe the vendors, or even the owners of the land, but to designate persons who might give any information about the property, which one thinking of purchasing would need. This did not require that the person referred to should be the owner of the land or the party selling it. Such inquiries could as well be answered by a lawyer, a real estate agent, the latest keeper of the hotel, or one who had been his clerk, as by the owner. There did not arise, therefore, any implication from the reference to Mr. Cummings, that he was owner, or even part owner, or that he was holding himself out as the party selling.

The next effort to sustain the instrument sued on as valid, may be said to be a vague effort to show, by the verbal history of the transaction, that defendant recognized Cummings as vendor by subsequent interviews and negotiations with him on the subject of the sale. And special importance in this part of the case is attached to a letter written by Davis, a lawyer, to Cummings.

The letter is liable to three objections, as a recognition by defendant of Cummings as the party of whom he had purchased:

1. No such recognition is to be found in the letter. It consists of suggestions on the part of Davis of what had better be done with the property; that Cummings, Mrs. Thompson and Grafton ought to take it, and that Grafton really don't wish to have anything to do with it. It is not even a recognition of the validity of the purchase, and nowhere speaks of Cummings as the vendor, but he might rather be supposed to be a purchaser with Grafton.

2. Davis does not profess to be speaking or acting for Grafton. He writes in his own name. It is shown by other evidence that, either as attorney, or for himself, he controlled the larger part of the debts against Thompson's estate, which made the sale necessary, and it may be fairly inferred that it was in this character he spoke.

3. There is no satisfactory evidence that he was authorized to act for Grafton in that transaction, and none whatever that he was authorized by him to write that letter. The New Hampshire statute requires that the authority of an agent to charge a party shall be in writing, and there is no pretense that Davis had any such authority from Grafton.

These views of the proper construction of the statute are amply sustained by authority.

In the leading case of *Wain vs. Walters*, 5 East's R., 10, decided by Lord Ellenborough under the English statute, the same as that of New Hampshire on the point in question, that eminent judge said: "The question is, whether that word (agreement) is to be understood in a loose, incorrect sense in which it may be sometimes used as synonymous to

promise or understanding, or in its more correct sense, as signifying a *mutual contract on consideration between two or more parties.*" He held the latter to be the true construction, and that all its essential elements must appear in the memorandum, including the consideration, which in that case was absent. This has been held to be the law in England ever since.

In the case of *Williams vs. Byrnes*, before the Privy Council, reported in 9 Jurist, N. S., 363, decided in 1863, the defendant had, in a letter to one Hardy, told him that he would furnish the funds to pay for a steam engine if the latter would find and purchase a suitable one. Hardy made a verbal contract for the engine, and the vendor sued defendant on this memorandum. Jessel, M. R., in delivering the judgment of the Privy Council, said: "The language of the statute cannot be satisfied unless the existence of a bargain or contracts appear in evidence in writing, and a bargain cannot so appear unless the parties to it are specified, either nominally, or by description or reference," and the ruling of the Chief Justice that this could be done by extrinsic proof as to who was the vendor was reversed. It is precisely in point with the one before us.

The case of *Sale vs. Lambert*, Law Reports, Equity, 18, p. 1, was a sale of real estate, in which the party charged was the vendor. The memorandum was signed by Sale, the purchaser, for himself, and by George Jackson, the auctioneer, *for the vendor*. This memorandum was endorsed on a bill of particulars of the conditions of the sale, in which it was said that the property was sold by the proprietor. The Court held that the word proprietor sufficiently described the vendor, and ascertained who was the party for whom the auctioneer signed. But in the very next case in the volume, *Potter vs. Duffield*, the same Court, by the mouth of the same judge, held that the words "confirmed on the part of the vendor, and signed Beadels," did not sufficiently designate who the vendor was, and that a suit against the owner could not be sustained on the memorandum. The Master of the Rolls said: "If you could go into evidence as to the person

who is described as vendor, the answer would be, that Polly was that person. *But that is exactly what the act says shall not be decided by parol evidence.*"

In the case before us, Mr. Walker, the auctioneer, does not even say that he signed for the vendor, as Beadels did in the case cited.

But the case, which should have most weight in informing our judgment, is that of *Sherburne vs. Shaw*, 1 New Hampshire R., 157, because it is an authoritative construction of the statute of the State where this contract was made, and where the land is situated to which the contract relates, made by the highest Court of that State sixty years ago, and never overruled. The case is so perfectly parallel to the one under consideration that its circumstances need not be repeated. It is sufficient to say, that the want of the vendor's name in the memorandum was held fatal to any right of action, though the auctioneer's name was signed to a memorandum otherwise sufficient. The concluding language of the Court is, that "the written evidence which hath been offered to prove the contract declared on, as it fails to give any intimation that plaintiffs were one of the parties to that contract, must itself be considered fatally defective and inadmissible."

The same doctrine is laid down in the excellent work of Mr. Browne on the Statute of Frauds, § 372 to 375, and the authorities fully cited. He also speaks of the case of *Salmon Falls Manufacturing Co. vs. Goddard*, decided by this Court, and reported 14 How., 446, as one which might be saved from conflict with the general rule, on the ground that a bill of parcels detailing the purchase was made out and sent to the purchaser, and accepted by him as such. In that case, Mr. Justice CURTIS, Mr. Justice CATRON and Mr. Justice DANIELS dissented in an able opinion by the judge first named. It may be doubted whether the opinion of the majority in all it says in reference to the case of parol proof in aid of even mercantile sales of goods by brokers, is sound law. It certainly furnishes no rule to govern us in the exposition of the statutes of New Hampshire, concerning contracts of sale

of real estate within its own borders, where it conflicts with the decisions of the Courts of that State on the subject.

Defendant in error relies mainly on that case, and the later one of *Beckwith vs. Tulbot*, U. S. R., 289. The latter case, however, affords no support to the argument of counsel. The defendant, in that action, was charged, it is true, on a memorandum in which his name was not found. But he produced that memorandum from his own possession on the trial, and letters of his written to plaintiff while the agreement was so in his possession were given in evidence, which referred to the agreement, and acknowledged its obligatory force on himself, in terms that required no parol proof to identify it as the agreement to which he referred. This was within all the cases a sufficient signing of the memorandum, though found in another paper, written by the party to be charged, to comply with the statute of frauds, and so this Court held.

We are of opinion, that there was no sufficient memorandum in writing of the agreement on which this suit was brought to sustain the verdict of the jury.

The judgment of the Circuit Court is, therefore, reversed, and the case remanded to that Court, with instructions to set aside the verdict.

Recent Decisions.

ATTACHMENT.

The property of a debtor in the custody of an officer of the law may be levied upon by attachment. But the actual possession of the officer cannot be interfered with, and the attachment only operates upon such of the property as remains after satisfying the claim under which the officer holds. (*Dunlap vs. In. Co.*, N. Y.)

ATTORNEY.

The imprisonment of a faithless attorney for not paying over money collected for his client, is imprisonment for contempt, and, therefore, justifiable. It is not in the nature of "imprisonment for debt." (*Smith vs. McLendon*, Ga.)

An agreement to pay a reasonable attorney's fee in the body of a promissory note, if it is "collected by suit," is absolutely void; it is contrary to the policy of our laws; it is an agreement to pay a penalty, and tends to the oppression of the debtor, and to encourage litigation. Opinion by HINES, J. (*Witherspoon vs. Musselman*, Ky.)

BANKRUPTCY.

A sale of the bankrupt's real estate, under an order of the Bankrupt Court, specifying that all liens shall be discharged by the sale, does not defeat the right of dower of the bankrupt's wife.

The estate taken by the assignee is precisely that of the bankrupt, and as realty in the hands of a bankrupt is affected by a right of dower, so it is in the hands of an assignee, and a Bankrupt Court cannot divest the right of dower. (*Laneau vs. Potter*, Assignee, Penn.)

BILLS OF EXCHANGE.

Demand and notice is not necessary, as against an endorser, who, at the date of maturity of the bill, has sufficient property of the maker in his possession for the purpose of securing him against liability. (*Beard vs. Westerman*, 32 Ohio St.)

CLERGYMAN'S SALARY.

Ministers of the Methodist Church are entitled to recover for their services, as ministers, whatever salary the congregation promises to pay them. (*Jones vs. Trustees of the Congregation of Mt. Zion*, Sup. Ct. Louisiana.)

Book Notice.

DIGEST OF AMERICAN REPORTS.

Digest of decisions in the Courts of the last resort of the several States contained in the American Reports from Volume 1 to 24, inclusive, with an index of notes by ISAAC GRANT THOMPSON, pp, xxi and 890. Albany: JOHN D. PARSONS, JR., Publisher, 1879.

The series of American Reports, edited by Mr. THOMPSON, is too favorably known to require further recommendation. There are now twenty-four volumes of those reports, being the leading and important cases, selected from nearly 450 volumes of various State Reports. It is now found necessary to make a digest of those twenty-four volumes. This digest gives a schedule of the State Reports selected from; a table of cases overruled, doubted and denied; an index to the reporters' notes; an index of cases digested, covering thirty-eight double column pages. The excellent arrangement of the digest dispenses with the absolute necessity of the reports themselves in case one enjoys the benefits of a Law Library. It is an indispensable aid to those possessing the reports. The subjects are arranged alphabetically, and under their appropriate heads, with cross-headings and references. The work seems skilfully performed, the typography and binding good, and we heartily commend it to the Bar.

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Current Topics.

THE Supreme Court of the United States have recently held, in the case of *United States vs. Ford et al.*, that accomplices in guilt, not previously convicted of an infamous crime, when separately tried, are competent witnesses for or against each other, and the universal usage is, that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offense, provided it appears that he acted in good faith and that he testified fully and fairly. Where the case is not within any statute, the general rule is, that if an accomplice when examined as a witness by the public prosecutor, discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offense disclosed, but it is equally clear, that he cannot by law plead such facts in bar of any indictment against him, nor avail himself of it upon his trial, for it is merely an equitable title to the mercy of the executive.

THE case of *W. H. Platt vs. the Union Pacific Railroad Company*, involving the right of settlers to pre-empt lands granted by Congress to the Railroad Company under section 3 of the Act of July 1, 1862, has just been decided in the United States Supreme Court. The Act referred to, provided that all lands granted to the company should be liable to pre-emption, if not "sold or otherwise disposed of" within three years after the completion of the entire road. On the 3d of September, 1878, the Secretary of the Interior decided that the mortgage executed by the Company upon lands in 1867 was not a "disposal" of the same within the meaning of that statute. This Court, however, reverses the decision of the Interior Department, and holds that the mortgage was such disposal, and consequently, the tract of land claimed by the complainant was not open to pre-emption when he undertook to pre-empt, and he has not an equitable title. Decree filed: Justice STRONG delivered the opinion, Justices BRADLEY, CLIFFORD and MILLER dissenting.

Supreme Court of California.

JANUARY TERM, 1879.

[No. 6,068.]

[Filed April 7, 1879.]

HANCOCK, RESPONDENT,

VS.

LOPEZ *et al.*, APPELLANTS.

In an action for the partition of a rancho, certain of the defendants alleged in their answer that they were the owners in fee of the whole rancho, and the Court having found that allegation to be true, rendered judgment accordingly in favor of those defendants. In an action of ejectment for a parcel of the lands of the rancho, brought by one of the above mentioned defendants, and against persons who were parties to that action, or claimed title under them, the judgment in that action is admissible in evidence to prove title in the plaintiff in the action of ejectment, and is conclusive upon that issue in respect to the title held or claimed by the parties to that action at the time of its commencement.

Appeal from Seventeenth District Court, Los Angeles County.

Henry Hancock, Attorney for Respondent.

H. Allen and Barclay & Wilson, Attorneys for Appellants.

PER CURIAM.

This is an action of ejectment for the recovery of the possession of a portion of the rancho La Brea. The Court admitted in evidence the judgment roll in an action for the partition of that rancho, brought by Antonio J. Rocha and others, against Henry Hancock and others. The plaintiffs in that action alleged that they were tenants in common, with certain of the defendants, in the rancho; and Henry Hancock, and certain other of the defendants, alleged in their answer, that they were the owners in fee of the whole of said rancho; and, the cause having been heard, the Court found that John Hancock, and certain other defendants named in the findings, were the owners of the whole of said rancho, and adjudged and decreed that the last named persons were the owners in fee of the whole rancho, and that they recover from the plaintiffs their costs, etc. The admis-

sion in evidence of that record presents the principal question in the case.

It is contended by the defendants that, upon its being found that certain of the defendants in that action held the title in fee to the whole rancho, it was the duty of the Court to dismiss the action—that the proof of such title in the defendants showed that the plaintiffs were not tenants in common, or joint tenants in the land, and that the only step the Court could then take was to dismiss the action—that the judgment which was in fact rendered is, in view of the findings, to be read as amounting only to a judgment of dismissal, and that such judgment of dismissal cannot be relied upon by the defendants in that action, as an adjudication of title in them.

ERRATUM.

The title of the case appearing on p. 169 should be "The People vs. Reclamation District No. 108 et al," and not "Hancock vs. Lopez."

plaintiffs in the case.

following section provides that in every case, other than those mentioned in the last section, judgment must be rendered on the merits. It does not appear that the plaintiffs failed to prove a sufficient case for the jury, nor does it appear that the defendants moved for a judgment of nonsuit, and therefore it cannot be treated as such a judgment in a technical sense.

But is a judgment for the defendants in partition upon such findings to be regarded in legal effect as only the equivalent of a judgment of nonsuit? The parties to the action, as was said in *Senter vs. Bernal*, 38 Cal., 637, and many other cases in this Court, are all actors or plaintiffs, each against each and all others. It is provided by Section 756, C. C. P., that the summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in the property, or any particular portion thereof; and Section 758 provides that the defendants must set forth in their answers, "fully and particularly, the origin, nature and extent of their respective interests in the property." In

construing these provisions, it was held by this Court, that "any question affecting the right of the plaintiff to a partition, or the rights of each and all the parties *in the land*, may be put in issue, tried and determined in such action;" that if "disputes exist as to their rights or interests in any respect, such disputes may be litigated and determined in such action." (See *Deuprey vs. Deuprey*, 27 Cal., 335; *Morenhou: vs. Higuera*, 32 Cal., 204; *Gates vs. Salmon*, 35 Cal., 579.)

The purpose and scope of the action is defined by the Code, and when the question is what issue may be presented, litigated and determined in the action, the Code must furnish the answer. The Code, (which is substantially the same as the previous statute) having declared that any right, title or interest in the land may be put in issue, tried and determined in the action, it necessarily follows that the determination of such issue is final and conclusive upon all the parties to the action. Had the Code provided that an issue in respect to the titles of the respective parties, or if any of them should be tried and determined in another action, there would be much force in the propositions advanced by the defendants; but as the provision is that such issue may be tried and determined in the action of partition, there is no reason why the determination should not be as conclusive as it would be, if made in an action brought for the sole purpose of its determination. Had the determination in the action in question been that one of the plaintiffs and certain of the defendants were the owners of the rancho as tenants in common, there would be no room to doubt that it would be conclusive as against the other parties to the action (both plaintiffs and defendants) to the effect, that they had no right, title or interest in the land. In our opinion, there is as little room for doubt that the judgment which was rendered—that certain of the defendants were the owners of the entire title—has the same effect as against all the other parties to the action. The judgment was admissible in evidence, in favor of the prevailing parties in that action, and was proof of title in them as against the other parties and those claiming under them.

Judgment and order affirmed.

[No. 6,074.]

[Filed April 7, 1879.]

PER CURIAM.

Upon the authority of *Hancock vs. Lopez*, No. 6,068, judgment and order affirmed.

[No. 6,012.]

[Filed April 5, 1879.]

HANCOCK, RESPONDENT,

VS.

LOPEZ *et al.*, APPELLANTS.

A Reclamation District is a public corporation for municipal purposes.

The existence of such a corporation may be established by implication arising from the passage of acts recognizing its existence, and requiring a corporation for the performance of the duties and powers enjoined or conferred by such Acts of the Legislature, however defective the original organization may have been.

The fact that reclamation of the lands of the district is impracticable, is not a sufficient ground upon which to base a judgment of forfeiture of the corporation.

Appeal from Seventeenth District Court, Los Angeles County.

Henry Hancock, Attorney for Respondent.

H. Allen and Barclay & Wilson, Attorneys for Appellants.

RHODES, J., delivered the opinion of the Court.

The principal purpose of this action is to procure a judgment to the effect that the reclamation district was not legally created, and has not now any legal existence. It was held in *Dean vs. Davis*, 51, Cal., 409, that a reclamation district was a public corporation. The reasons there stated and the authorities cited fully sustain the proposition. Such corporations are sometimes denominated *quasi* corporations, for the reason that they have not all the powers which belong to corporations by the common law, or all those which are usually possessed by municipal corporations; but, as

they possess all the powers, neither by express grant or necessary implication, which are requisite for the performance of the duties enjoined upon them by law, they are to be regarded as public corporations for municipal purposes.

The plaintiff, for the purpose of showing that the reclamation district had not been legally organized—that is to say, that the corporation had not been duly created—offered to prove that, at the hearing of the petition for the organization of the district, no evidence was introduced before the Board of Supervisors showing that the petitioners owned more than one-half of the land included within the proposed district, or that the lands were susceptible of reclamation, or that they were “swamp and overflowed lands,” and the plaintiff offered evidence to prove that many of the matters set forth in the petition for the formation of the district were not true, but the Court excluded the evidence. The plaintiff also relies upon the alleged facts that the Trustees of the district have been guilty of official misconduct in several respects—such as in acquiring the title of the State to parcels of the lands in the district, in making a false certificate and in involving the district in debt.

In the view we take of the case, it is immaterial whether the Board of Supervisors performed the duty enjoined upon it by law of ascertaining and finding the truth of the matters alleged in the petition. A corporation of this character is, as already stated, a public corporation. Such a corporation can be created not only by the means and in the manner provided by the general law, but also by special act, or by *implication of law*. Legislative recognition of a corporation is in many cases sufficient proof of its existence. Powers or privileges may be conferred or duties enjoined of such a character that a corporation would be required, and from which a corporation must be implied. If such powers or privileges cannot be enjoyed, or if such duties cannot be performed, without acting in a corporate capacity, a corporation, to that extent, is created by implication. This result must necessarily ensue, otherwise the purpose of the Legislature must fail. There are many cases affirming this doc-

trine. In *Fourth School District vs. Wood*, 13 Mass., 192, it was held that school districts were corporations, and as such, had the power to sue, though they had not been expressly created as corporations, or authorized to sue. In *Bow vs. Allenstown*, 34 N. H., 351, it was held that a joint resolution of the Legislature "to empower said town of Allenstown to elect a Representative," and a subsequent act of the Legislature, by which certain lands were annexed to the town of *Allenstown* showed that the Legislature "intended to recognize Allenstown as a place entitled to all the powers of a town, and to confer them upon it, if it had them not already;"—that the act is "not only a recognition of Allenstown as a town, but it must be construed to confer the powers of a town in future, if it had not been before incorporated." *Jamison vs. The People*, 16 Ill., 257, was a *quo warranto*, to test the question of the existence of the town of Oquaka as a corporation. The Legislature had authorized the town to subscribe for the stock of a railroad and of a plank road, to issue and negotiate bonds, and to levy and collect taxes, and it was held that those acts "precluded inquiry into the question of the original legal organization of the town, and are conclusive upon the question of the existence of the corporation." *The People vs. Farnham*, 35 Ill., 562, is similar in its principal features to the last cited case, and the same doctrine was maintained. (See also *People vs. Manhattan Co.*, 9 Wend., 379; *North Hemstead vs. Hemstead*, 2 Wend., 109; 1 Dill. Munic. Corp. §§. 22, 51, and cases cited; Ang. & Ames on Corp., §. 77, and cases cited.)

In 1872, the Legislature passed two acts relating to Reclamation District No. one hundred and eight. By the first, provision was made, that all warrants *drawn, or to be drawn*, by the Trustees of the district should bear interest from their presentation, and that delinquent assessments *levied, or to be levied*, should bear interest, etc., and that the assessments and interest should be placed to the credit of the district. (Stats. 1871-2, p. 696.) By the second act, it was provided, that "All swamp and overflowed lands which were included within the limits of Reclamation District No. one

hundred and eight, as formed by the Board of Supervisors of Yolo county, shall be, and they are hereby declared to be, liable for all assessments levied, or to be levied, thereon for the works of reclamation in said district." (Stats. 1871-2, p. 776.) These acts distinctly and unequivocally recognize the existence of the district; and, in order that they may have effect, it is essential that the district remain as a corporation with the general powers of corporations of that class. The acts contemplate the continuance of works of reclamation and the raising of money by the levying of assessments for that purpose. These acts are sufficient to establish the legal existence of Reclamation District No. one hundred and eight as a public corporation, whatever defects there may have been in the original formation of the district.

The authorities are uniform upon the proposition that a public corporation will not be dissolved by a judgment of forfeiture of its powers and franchises, because of the acts or misconduct of its officers. (2 Dill. Munic. Corp., s. 720.)

It is alleged, that large sums of money have been expended in attempting to execute the original plan of reclamation; that there is a large amount of land in the district that cannot be reclaimed by any plan; that a large debt has been created; and that the district is insolvent—all of which amount in substance to the allegation that the present plan, or any plan, of reclamation is impracticable. This may be an appropriate question for legislative consideration; but clearly, it is not a judicial question, and that fact, if proven, is not a sufficient ground for a judgment of forfeiture.

The remaining questions do not require special notice.

Judgment and order affirmed.

Remittitur forthwith.

WALLACE, C. J.

NILES, J.

Supreme Court of the United States.

OCTOBER TERM, 1878.

[No. 150.]

THE UNITED STATES, ON THE RELATION OF MORRIS
RANGER, PLAINTIFF IN ERROR,

VS.

THE CITY OF NEW ORLEANS.

1. When a municipal corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited.
2. So, where authority to borrow money, or incur an obligation, in order to execute a public work, is conferred upon a municipal corporation, the power to levy a tax for its payment, or the discharge of the obligation accompanies it, and this too without any special mention that such power is granted.
3. Where a municipal corporation has power to levy a tax. to pay its lawful obligations, it is its duty so to do; and if it neglects this duty, the Court will compel its performance by mandamus.

Error to the Circuit Court of the United States for the District of Louisiana.

Mr. Justice FIELD delivered the opinion of the Court.

This was an application for a writ of mandamus to compel the city of New Orleans to pay certain judgments. The petition of the relator, which was presented in April, 1876, alleges that he had recovered three judgments in the Circuit Court of the United States against the city for an amount exceeding in the aggregate fifty-nine thousand dollars; that they were recovered on bonds and coupons of the city, issued under the provisions of acts of the legislature of Louisiana, passed on the 15th of March, 1854, and designated as Nos. 108 and 109; that executions had been issued upon the judgments and returned unsatisfied; and that there was no property belonging to the city subject to seizure thereon.

It also alleges, that in June, 1870, the city had sold eighty thousand shares of stock of the New Orleans, Jackson and Great Northern Railroad Company, which it held, for the sum of three hundred and twenty thousand dollars, and that by the act No. 109, of 1854, these shares were forever pledged for the payment of the bonds issued under its provisions; that the city should, therefore, be compelled to pay out of their proceeds so much of the judgments as appears on the face of the records to have been rendered upon the bonds; or, in case their payment cannot be enforced in this way, that it should be compelled to levy and collect a tax for that purpose; and, also, a tax to pay so much of the judgments as was rendered upon bonds and coupons issued under the act No. 108, of 1854; but that the Mayor and Administrators, who represent and exercise the powers of the city, refuse to pay the judgments out of any funds in their possession, or under their control, or to levy a tax for their payment. The relator, therefore, prays the Court to order them to show cause why a writ of mandamus should not be issued compelling them to apply the proceeds and to levy a tax as mentioned.

The order to show cause was accordingly issued; and the city authorities appeared and filed an answer to the petition, in which they admitted the recovery of a judgment by the relator—speaking of the three judgments as one—the issue of executions thereon, and their return unsatisfied, the sale of the eighty thousand shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company for \$320,000, and the receipt of the money by their predecessors; and set up as a defense to the prayer of the petition, that the judgment was recovered upon certain bonds issued by the city to that company under the act of March 15th, 1854, No. 109—making no mention of the act No. 108—that no tax for the payment of the principal of the bonds is directed to be levied by that act, or any other act of the legislature; that, as respects the interest on the bonds, provision is made for its payment out of the back taxes due to the city, and inserted in its budget for 1876; and that the

proceeds arising from the sale of the stock of the railroad company are not in the treasury of the city, or under their control, having been used and expended by their predecessors. They, therefore, prayed that the petition be dismissed.

The relator demurred to this answer; the Court overruled the demurrer and refused the writ; and from its judgment the case is brought to this Court.

The judge of the Circuit Court accompanied the judgment with an opinion, giving the reasons of his decision, which were substantially as stated in the answer; that the statute authorizing the issue of the bonds, upon which the judgments were recovered, made no provision for levying a tax to pay the principal, but intended that it should be paid out of the stock of the railroad company and its revenues; and that the proceeds from the sale of the stock had been already expended by the predecessors of the present city authorities. The Court, adopting the view of the city authorities as to the construction of the statute, and the supposed intention of the legislature, proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the government, and that the judiciary cannot direct a tax to be levied when none is authorized by the legislature; and that the issuing of a mandamus to apply the proceeds received from the sale of the stock would be a futile proceeding, they having been previously used for other purposes. A writ, said the Court, could not issue commanding the performance of an admitted impossibility.

The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the State for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accom-

plishment of those purposes its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order and health, and the execution of such measures as conduce to the general good of its citizens, such as the opening and repairing of streets, the construction of sidewalks, sewers and drains, the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream or on a harbor of a lake or sea, their powers are usually enlarged, so as to embrace the building of wharves and docks, or levees, for the benefit of commerce, and they may extend also to the construction of roads leading to it, or the contributing of aid towards their construction. The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require, for their execution, considerable expenditures of money. Their authorization, without providing the means for such expenditures, would be an idle and futile proceeding. Their authorization, therefore, implies, and carries with it, the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality, without the power of taxation, would be a body without life, incapable of acting, and serving no useful purpose.

For the same reason, when authority to borrow money, or incur an obligation, in order to execute a public work, is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact, that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation. “It is, therefore, to be inferred,” as observed by this Court in *Loan Association vs. Topeka*,

"that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." (20 Wallace, p. 660.)

The doctrine here stated is asserted by the Supreme Court of Pennsylvania in *Commonwealth vs. Commissioners of Allegheny County*, 37 Penn. Reports, p. 277. That county was authorized by an act of the legislature to subscribe to the capital stock of a railroad company, and to issue its bonds in payment thereof. The interest on them being unpaid, a writ of mandamus was applied for to compel the Commissioners of the county to make provision to pay it. The return of the officers set up, among other objections to the writ, that the act authorizing the subscription and issue of the bonds provided no means of payment, either of the principal or interest. To this defense the Court said: "The act of 1843 authorized subscriptions by certain counties to be made as 'fully as any individual could do,' without prescribing more precisely the terms. But by the 5th section of the act of April 18th, 1843, counties subscribing are authorized to borrow money to pay for such subscriptions. We have decided, that bonds or certificates of loan, issued by a municipal corporation, is an ordinary and appropriate mode of borrowing money, and the act of 1853 expressly authorized the issue of such securities. The subscriptions were accordingly made, and the bonds issued. Thus was a lawful debt incurred by the county, and as no other than the ordinary mode of extinguishing it, or of paying the interest thereon, was provided, it follows, of course, that the ordinary mode of raising the means must be resorted to, namely, to provide for it in the annual assessment of taxes for county purposes." Again, in the same case, the Court said: "In the next place it is averred, that there is no authority to levy a tax for the payment of the interest by the county. We have already treated of this, and said that the authority to create the debt implies an obligation to pay it; and when no

special mode of doing so is provided, it is also implied that it is to be done in the ordinary way—by the levy and collection of taxes."

In numerous cases similar language is found in opinions of the State Courts, not required, perhaps, to decide the point in judgment therein, but showing a recognition of the doctrine stated. Thus, in *Lowell vs. Boston*, the Supreme Court of Massachusetts, in speaking of bonds which the legislature had authorized the city of Boston to issue, in order to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city which was burned in the great fire of November, 1872, said: "The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible, and not improbable, consequence of a necessity to provide for their payment by the city. The right to incur the obligation, implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." (111 Mass., 460.) To the same purport is the language of the Supreme Court of Wisconsin, in *Hasbrouck vs. Milwaukee*, (25 Wisconsin, 122.) And in the recent case of *Parsons vs. The City of Charleston*, in the United States Circuit Court, the Chief Justice gave emphatic affirmation to the doctrine. (Hughes, 282.) Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it.

In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds, upon which they were rendered, is not now open to question. Nor is the payment

of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed.

If the question were an open one, our conclusion would be the same. The act of 1854 provided that the railroad company should issue to the city certificates of stock for an amount equal to the amount of bonds received; and that the stock should remain "forever pledged for the redemption of said bonds." It is plain that this language was intended only to create a statutory pledge by way of collateral security for the payment of the bonds. It does not import that the holders of the bonds were to be thereby precluded from looking to the city, or that they were obliged to have recourse, in the first instance, to the pledge. The city, by the terms of the bonds, was primarily liable; and nothing in the language of the act in any respect affects this primary liability. The bondholder is not compelled to look to the security, but may proceed directly against the city, without regard to it. Besides, as was justly observed by counsel, if we could seek the intention of the legislature from other considerations than the words of the statute, it would be still plainer that no such construction could be given to its language. The object of issuing the bonds for the stock was to aid the company in obtaining funds to build its road. If the stock had been available, the bonds would not have been needed; the stock would have been sold. But it was not available, and it is difficult to believe that the bonds would have been any more so, if their payment had been limited to the revenues and proceeds of the stock. The proposal of such a scheme for raising money would not have indicated much wisdom on the part of the legislature; to have assented to it would have indicated less on the part of

the bondholders. And even if the bondholders had been required to look for payment of the bonds only to the revenues and proceeds of the stock, it comes with bad grace from the city, not to say evinces an insensibility to its obligations, to allege exemption from liability after its authorities have sold the stock and diverted the proceeds to other uses.

This construction is not affected, as contended by counsel, by the statutes of 1852 and 1853, restraining cities and towns from creating any indebtedness without providing at the same time for the payment of the principal and interest. Those statutes were not limitations on the power of the legislature to authorize the creation of debts by cities upon other conditions. It does not follow, that because it was deemed expedient, as a general rule, to prohibit cities and towns from incurring debts on their own motion, without making provision for their payment, that the legislature might not authorize the incurring of a particular obligation without such provision. And it will be found, upon examination, that the act of 1854 prescribed the details of the ordinance which should be passed by the city in the execution of the authority conferred, and that the ordinance passed conformed to them. (*Butz vs. Muscatine*, 8 Wall., 575; *Amey vs. Allegheny*, 24 How., 364; *Commonwealth vs. Pittsburg*, 34 Penn. St., 496; *Commonwealth vs. Commissioners*, 40 Penn. St., 348; *Commonwealth vs. Perkins*, 43 Penn. St., 400; *Fosdick vs. Perrysburg*, 4 Ohio St., 472.)

There is nothing, therefore, in the positions of counsel to impair the validity of the bonds upon which the judgments were recovered, if we were at liberty to consider them on this application. But, as already said, the judgments are conclusive upon this point. Owing the debt, the city has the power to levy a tax for its payment. By its charter, in force when the bonds were issued, it was invested, in express terms, "with all the powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same."

As already said, the power of taxation is a power incident

to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the legislature empowers the corporation to do is presumably for its benefit, and may, in "the proper government of the same," be done. Having the power to levy a tax for the payment of the judgments of the relator, it was the duty of the city, through its authorities, to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a mandamus should have been issued to enforce its performance. (*Knox Co. vs. Aspinwall*, 24 How., 376; *Von Hoffman vs. Quincy*, 4 Wall., 535; *Benbow vs. Iowa City*, 7 Wall., 313; *Supervisors vs. Rogers*, 7 Wall., 175; *Supervisors vs. Durant*, 9 Wall., 415; *County of Cass vs. Johnston*, 95 U. S., 360.)

The judgment of the Court below must, therefore, be reversed, and the cause remanded, with directions to issue the writ as prayed in the petition of the relator; and it is so ordered.

(No. 157.)

THE UNITED STATES *ex rel.* PARSONS,

vs.

THE SAME.

This case is similar in all essential particulars to that of *The United States ex rel. Morris Ranger vs. The City of New Orleans*, and, upon the authority of the decision therein, the judgment below must be reversed, and the cause remanded, with directions to issue a writ of mandamus to levy and collect a tax, as prayed by the relator, to pay the judgment described in his petition, with lawful interest thereon; and it is so ordered.

Recent Decisions.

CRIMINAL LAW.

Admissions.—Admissions made at the first trials, if reduced to writing, or incorporated into a record of the case, will be binding at another trial of the case, unless the presiding Justice, in the exercise of his discretion, thinks proper to relieve the party from it. (*Holly vs. Young*; 68 Me.)

Arrest.—A man illegally restrained of his liberty may use such means as may be necessary, short of taking life, to regain his freedom, and when death does not result from the violence used in such a case, although the prisoner may have attempted to take life, he would not be guilty of more than an aggravated assault. (Texas Court Appeals, *Goodman vs. State.*)

DECEIT.

Where a Sheriff, in selling real estate under an execution, makes a statement, in good faith and without any intent to deceive, to the effect that no incumbrance exists upon the land except the wife's dower in same, and it turns out that an estate of homestead exists in the land, which, however, at the time was not known to the Sheriff, an action of tort, in the nature of deceit, can not be maintained against the Sheriff by one who relied upon the representations and bought in the property at the sale. (*Tucker vs. White*; Mass.)

ESTATES OF DECEDENTS.

A life policy, payable to a child of the intestate, should be charged up at its value, upon distribution of the estate, as an advancement. (*Rickenbacker vs. Zimmerman*; S. C.)

ESTOPPEL.

Widow is estopped from claiming dower where real estate is sold by the husband, in her presence, free of dower. (*Hart vs. Giles*; Mo.)

STOPPAGE IN TRANSITU—END OF TRANSITUS—CONSTRUCTIVE DELIVERY—DELIVERY OF PART OF CARGO—LIEN OF MASTER FOR UNPAID FREIGHT.—A question of some importance, with regard to the effect of the delivery of part of a cargo to the purchaser upon the right of the unpaid vendor to stop *in transitu*, was raised, says the *Solicitors' Journal*, before the Court of Appeal, on the 20th of February, in a case of *Ex parte Cooper*, under the following circumstances: 114 tons of miscellaneous iron castings were, on the 30th of July, shipped in Scotland by a firm of manufacturers, on board a vessel chartered by them and consigned to a merchant in London. The bill of lading was made out in favor of the purchaser or his assignees, "he or they paying freight." On the 7th of August the ship arrived in the port of London, and the same day thirty tons of the iron were delivered on board a barge belonging to the purchaser. On the 8th of August the vendors gave notice to stop the unloading of the ship. At this time a portion only of the freight had been paid to the master. On the 19th of August the purchaser filed a liquidation petition in London. On the 23d of August the balance of the freight was paid by the receiver who had been appointed under the petition, and the remainder of the iron was then landed, and placed *in medio*. On the 21st of September a petition for sequestration was presented by the vendors in Scotland. The question then arose, who was entitled to the goods which remained on board the ship when the notice to stop *in transitu* was given—the English trustee or the Scotch trustee. On behalf of the English trustee, it was urged that the delivery of part of the cargo on the 7th of August amounted to a constructive delivery of the whole, and thus the *transitus* was at an end before the notice to stop was given. If it was a question of intention, the intention at the time of the partial delivery must be regarded, and at that time there could be no doubt that the intention was to deliver the whole cargo. Reliance was placed mainly on the cases of *Shebey vs. Heyward*, 2 H. Bl., 504, and *Hammond vs. Anderson*, 1 B. & N. P. R., 69, in both of which, there having been a partial delivery of a cargo, it was held that the *transitus* was at an end as to the whole, and, consequently,

that the vendor was too late to stop *in transitu*. The Court (JAMES, BRETT and COTTON, L. JJ.,) however, held that, under the circumstances, the partial delivery did not operate as a constructive delivery of the whole, mainly upon the ground that, the whole of the freight not having been paid, the master of the ship was not bound to deliver more than that proportion of the goods which corresponded to the amount of freight which had been paid, and that it could not be supposed that he intended to abandon his lien upon the remainder of the iron for the unpaid freight. The partial delivery could not, therefore, as between him and the purchasers, operate as a constructive delivery of the whole, and, consequently, he was not holding the goods as bailee of the purchaser, but was still holding them as carrier when the notice to stop was given; and the notice was in time. The Court distinguished both the above mentioned cases in this way: In *Shebey vs. Heyward*, the partial delivery was to a person to whom the purchaser of the goods had indorsed the bill of lading, and in *Hammond vs. Anderson*, though the purchaser had taken away only a part of the goods, yet he had weighed the whole of them at the wharf after an order had been given by the vendors to the wharfinger to deliver the whole to him. In both cases there had been, in effect, an attornment by the carrier or wharfinger to the person who had obtained the delivery of the part, so that he had become the agent of that person. Cotton, L. J., intimated an opinion (though he said it was not necessary to decide the point) that if the cargo, instead of being a miscellaneous one, had consisted of the different parts of one entire machine, the delivery of an essential part of the machine might have amounted to a constructive delivery of the whole, so as to prevent the vendor from afterward having any right to stop *in transitu*. And the Court unanimously laid down this proposition: "Where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the *transitus* is not at an end as long as the carrier continues to hold the goods as a carrier; and it is not at an end until the carrier, by agreement between himself and the consignee, agrees to hold for the consignee, not as carrier, but as his agent."

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Current Topics.

IN the Municipal Court of Appeals, a few days ago, Judge Freelon delivered an opinion in the case of *Moody vs. The Crown Point Gold and Silver Mining Company*. In this case plaintiff lost twenty shares of stock, the certificate for the same being properly endorsed in blank. In the course of business the certificate came into the hands of a broker, for sale. The stock was sold in the usual way, and the proceeds, less commissions, paid to the broker's customer. Upon receiving the certificate, the broker sent to the office of the company to see if it was correct, and was informed that it was. Neither the broker nor the company had knowledge of the loss before the sale, or that the plaintiff was the owner. The certificate was sent to the office of the company for transfer, and on the next day, after the transfer had been made, but before the new certificate had been delivered, the plaintiff ascertained this loss and reported it to the defendant. Thereupon a delivery to the broker was refused. He still retained the stock, and demanded the delivery to him of the new certificate. The plaintiff sued the defendant for the delivery of the stock or its value, and the damage for its detention. The Court held, that when a certificate of stock endorsed in blank is stolen, and is purchased, in the usual course of business, in good faith, and without notice by a third person, the purchaser will acquire a valid title as against the person from whom it was stolen, or who may have lost it. Judgment was therefore given to defendant for his costs, defendant holding the property subject to the right of the purchaser.

Supreme Court of California.

JANUARY TERM, 1879.

Unwritten Opinion.

[No..5,843.]

FRASER, PLAINTIFF AND RESPONDENT,

VS.

REAY *et al.*, DEFENDANTS AND APPELLANTS.

Appeal from Fifteenth District Court, city and county of San Francisco.

This is an action to foreclose a mortgage on real estate, neither principal or interest on the note for which same was given having been paid.

The complaint *inter alia* alleges that, in February, 1876, after note became due, the plaintiff was about to commence suit upon the same and to foreclose mortgage, and informed defendant Reay thereof. That Reay thereupon, in consideration that plaintiff would not *then* commence suit upon said note, agreed with plaintiff, in writing, that he would thereafter pay interest at the rate of one per centum per month until paid, which he never did.

Defendant, in his answer denies this, and avers, that he agreed to pay the one per cent. monthly interest on principal sum until paid, if plaintiff would wait for payment until defendant should get the money to pay him, and that was the only condition therein contained, and he has not yet got the money to pay plaintiff, and has not had it since he made the agreement with plaintiff.

Plaintiff says that he has waited a *reasonable length of time*, and therefore brings suit. Defendant Reay joins issue on this proposition, as that plaintiff "should wait for payment until defendant should get the money to pay him."

Judgment for plaintiff. Decree of foreclosure and sale.

Defendant Reay appealed.

Jas. K. Byrne, Attorney for Respondent.

In order to avoid delay, and being desirous to obtain his money, plaintiff conceded everything claimed by Reay in his

answer, remitted the additional two per cent. interest claimed after February, 1876, and allowed him a credit of \$215 claimed by him, and then, upon notice to his counsel, demanded judgment on the pleadings, which was granted on 14th September, 1877, for the amount due plaintiff by defendant's own showing.

The sole object of the appeal is delay—is manifest on the face of the record, and I will only cite to the Court that portion of Sec. 957 of C. of C. P., which provides:

“When it appears to the Appellate Court that the appeal was made for delay, it may add to the cost such damages as may be just.”

E. A. Lawrence, for Appellants.

There was no amendment of the complaint, nor offer to amend; no trial had, or offer for a trial; no motion to strike out, or demurrer to the answer, but a naked motion for judgment on the pleadings.

I deny the appeal is for delay. The proceeding is unheard of, and without a precedent in the 2,000 volumes of American Reports.

When an issue is presented it must be tried in an orderly manner. If the party plaintiff dislikes the issue he has presented, he can amend and leave out the issue so presented.

If, then, no issue is presented by the answer, he can move for judgment upon the pleadings, and in that manner only.

An agreement to wait until defendant “should get the money to pay him,” in consideration of an increased rate of interest, put into writing, as plaintiff's complaint alleges it was, would be a valid agreement, and upon a sufficient consideration; and when proven would defeat the suit as prematurely brought.

The only course for plaintiff to pursue under such circumstances is to amend the complaint, leaving out the objectionable matter, and then, if no issue is presented by the answer, to ask for judgment upon the pleadings. While an issue is presented by the pleadings which is material, it must be tried. Such a pleading cannot be frivolous. (40 Cal., 439; 40 Cal., 347; 2 Till. & Shear Pr., 190-195; 43 Cal., 395; *Mahe vs. Reynolds*, — Cal.)

By moving for judgment on the pleadings, the moving party admits the sufficiency of the pleading of his adversary. It is going to trial upon the pleadings. (41 Cal., 128.)

If he deems the answer insufficient he must demur, when leave will be given to amend. If he deems the pleading sham or irrelevant, he must move to strike out.

Judgment affirmed.

[No. 5,871.]

ROPER *et al.*, PLAINTIFFS AND APPELLANTS,

vs.

COTTER *et al.*, DEFENDANTS AND RESPONDENTS.

Appeal from Twelfth District Court, city and county of San Francisco.

Action of ejectment. Complaint filed April 17th, 1868. On April 15, 1869, *two days less than one year* thereafter, summons was served upon defendants Cotter and Reynolds. On May 4, 1869, Cotter and Reynolds filed their answer. Nothing further was done in said action until 15th August, 1876, *more than seven years after the filing and service of said answer*, at which last mentioned date, on the filing of affidavit by defendants' attorney, an order was made by the Court on plaintiff to "show cause why action should not be dismissed for failure of plaintiffs to prosecute same with reasonable diligence." On October 6, 1876, the matter was heard by the Court, affidavits being read and filed for and against said motion. On October 10, 1876, the Court granted motion, and directed judgment to be entered accordingly. Judgment was entered October 14, 1876. *One year* thereafter, to wit, on October 13th, 1877, a paper purporting to be, and by the affidavit of ———— sworn to be, "a copy" of a notice of appeal, was delivered to the clerk of defendants' attorney, at the office of the attorney. No undertaking on appeal was filed until October 18, 1877, *one year and four days after the entry* of said judgment.

Appeal by plaintiffs from this judgment:

J. M. Seawell, Counsel for Appellants.

The delay was by mutual consent of the parties, and was fully explained in the Court below. At the time when notice

was given of motion to dismiss, the case had been answered ready at the calling of the calendar for July term, 1876.

Plaintiffs' attorney swears in his affidavit, that he had on several occasions prior to 1876 answered the cause ready, but that on each of such occasions defendants' attorney requested that the cause be continued, assigning as a reason that the trial of this action ought to be delayed until the final determination of the case of *Spanagel vs. Dellinger*, which involved defendants' title to the land in controversy; and this was finally agreed on. That case was not ended until October 28th, 1875.

It appears by the affidavit of ——— that one of the defendants—Reynolds—died on February 14, 1876. Consequently, the judgment, as to him, was a nullity. (35 Cal., 463; 44 Cal., 284.)

M. G. Cobb and James B. Townsend, of Counsel for Respondents.

No appeal has been taken *because* no "notice of appeal" was *served* on the defendants or their attorney. The paper left at the office of defendants' attorney was only "a copy" of a supposed or real notice, and not an *original* bearing the *signature* of the plaintiffs' attorney, as required by law. (C. Civ. Pro., 940.)

No undertaking on appeal was filed "within one year after the entry of said judgment." Such *undertaking* is *indispensable* to a *complete*, valid and *perfect* appeal, the *taking* of which is limited to the ample space of *one year*. (C. Civ. Pro., 939 (subd. 1), 940; 51 Cal., 417; Pac. Law Rep., Aug. 22, 1876, p. 270.)

This Court will not undertake to *relieve* a party from the effect of his own carelessness or negligence in not observing the mode or time prescribed by law for taking appeals. (42 Cal., 278.)

The dismissal of an action for want of prosecution is a matter resting in the *discretion* of the Court below, and this Court will not interfere with the exercise of that discretion, except in a clear case of its abuse, which does not appear in this record, but the contrary. (50 Cal., 38; 36 Cal., 585.)

Judgment affirmed.

United States Circuit Court.

[DISTRICT OF OREGON.]

MONDAY, FEBRUARY 10, 1879.

[No. 410.]

RUTH A. SEMPLE AND EUGENE SEMPLE,

VS.

THE BANK OF BRITISH COLUMBIA.

1. *Former Adjudication.*—The judgment or order of a Court is not an estoppel, unless the matter decided was within the purview of the proceeding before the Court, and directly within the issue made and tried therein.
2. *Action for Rents and Profits.*—In action for meane profits the amount expended by the defendant, while in the occupation of the premises for necessary repairs and legal taxes, ought to be deducted from the gross rents, or value thereof, and the balance is the damage which the plaintiff has sustained, and which he is entitled to recover.

DEADY, J.

This action is brought to recover the sum of \$4,400 for the use and occupation of lots 2 and 3 in Park block No. 1, in the city of Portland. The complaint alleges, that the defendant is a foreign corporation doing business in Portland, and that the plaintiffs are husband and wife, and citizens of Oregon; that the defendant, on July 18, 1874, entered into the possession of the premises, and received the rents and profits of the west half of said lot 3 until May 1, 1878, and of the remainder of said premises until the commencement of this action, May 11, 1878; that during all said period the plaintiff Ruth A. Semple "was, and now is, the owner in fee in her separate right" of said premises; and that the reasonable value of said rents and profits during the period aforesaid is \$100 per month.

The answer of the defendant, filed January 1, 1879, denies the ownership of Ruth A. Semple; admits the possession of the premises by the defendant as alleged; denies that they were worth \$100 per month; but admits that the defendant received rents from the premises during the period aforesaid

of the value of \$4,297 57, and alleges that it expended thereon during the same period, for necessary repairs, \$1,049 85—, paid taxes duly assessed thereon \$674 48, and for "insurance against loss by fire," \$530 50—\$2,254 83; which being set off against the rent, leaves a balance of \$2,042 74.

The answer also contains a plea of a former adjudication, to the effect, that on July 8, 1878, the Circuit Court for the county of Multnomah, in "a bill of suit and proceeding in equity" then depending therein between the same parties, duly made a decree "whereby the whole matter and thing in litigation here was finally determined;" and that the same is still in full force and effect.

The plaintiffs, by their reply, specially deny the affirmative allegations of the answer, including the defense of a former adjudication.

The "proceeding" referred to in the plea of a former adjudication arose in this way:

On June 27, 1873, the plaintiff Eugene Semple made and delivered his promissory note to the defendant in the sum of \$9,500, payable on or before January 1, 1874, with interest at one per cent. per month; and on the same day said Semple and the plaintiff Ruth A. Semple executed a mortgage of the premises to the defendant, as security for the payment of said note; that on March 10, 1874, suit was brought in the Circuit Court aforesaid, to enforce the lien of said mortgage, which resulted, on June 17, 1874, in a decree against said Eugene upon said note for the sum of \$10,228, with interest as above from said date, and that the premises which were admitted and declared to be the separate property of Ruth A. should be sold as upon execution to satisfy the same, with the costs and expenses of suit; that upon July 18, 1874, said premises were sold to the defendant, in pursuance of said decree, which sale was confirmed on August 3, 1874, and a conveyance thereof made to the defendant by the Sheriff on May 20, 1875: that afterward, on May 1, 1878, the defendant filed a motion in said Circuit Court, based upon the proceedings in said suit and an affidavit of Mr. W. W. Francis, its manager, asking the Court "to set aside the return of the

execution issued upon the decree in said suit, and all subsequent proceedings thereon had, and for leave to issue a new execution upon the said decree," or for such other relief as the Court might think proper to grant.

The affidavit of said manager gave the outline of the proceedings in said suit as above, and then stated that the defendant "*took possession of said property under said sale and conveyance,*" and still retains the same; that in 1877 said Ruth A. commenced an action in the Circuit Court of the United States for this district, against the defendant, for the recovery of the possession of the west half of said lot 3, claiming to be the owner thereof in fee, upon the grounds that the Sheriff who executed the conveyance thereof to the defendant, not being the Sheriff who made the sale, was without authority; and also that the defendant, being a foreign corporation and not having appointed an attorney in the State to accept service of process against it, as provided by the statute of the State, was not authorized to make said purchase or receive said conveyance, and that said Circuit Court, upon the trial of said cause without a jury, found said purchase and conveyance to be a nullity; that said decision, in effect, decides that the defendant has no title to any part of said premises, whereby the defendant obtained no satisfaction of said decree; and that the rental value of said premises is less per month than the interest upon said decree.

Notice was given of the motion, and after hearing the parties, the Court, on June 11, 1878, set aside the entry of satisfaction on the lien docket, the return on the execution, and authorizes an *alias* execution to issue to enforce the decree and sell the premises to satisfy the same. The order further provided: And it appearing that the defendant "hath for some time been holding and using the property," it is further ordered, that it "do bring into court the whole amount of rent money taken by it from said property," to abide the future order of the Court; and leave was given to the plaintiffs within ten days to file affidavits or make further defense to the proceeding. The plaintiffs made no defense—that is, filed no allegations or affidavits; but on July 8, 1878, the

Court made an order stating therein that the defendant was in possession of the premises *as mortgagee* of the plaintiffs, and should account to them accordingly; that the receipts and expenditures of the defendant, in connection with the premises, were as stated above; and applied the balance due from the defendant—\$2,042 74—upon said decree, discharging the defendant from all liability to the plaintiffs therefor, and directed that execution issue for the balance of the decree—\$13,260 06; from which order the plaintiffs appealed, and said appeal is now pending in the Supreme Court of the State.

On August 10, 1878, the premises were sold on the *alias* execution to said Francis, for the amount of said decree, and on October 18 following said sale was confirmed.

The plaintiff Ruth A. claims title to the premises from the United States, under Sec. 4 of the Donation Act of September 27, 1850, as the child of Nancy Lownsdale, the wife of Daniel H. Lownsdale, a settler upon the premises under said section. The patent for the donation issued to said Daniel H. and Nancy on June 6, 1865—the latter having died in 1854 and the former in 1862, both intestate. Under the circumstances, the patent inured to the benefit of the parties who were entitled to take the donation upon such a contingency, of which the plaintiff Ruth A. was one. (See *Fields vs. Squires*, 1 Deady, 367; *Lamb vs. Starr, Id.*, 452; *Lamb vs. Wakefield*, 1 Saw., 252; *Davenport vs. Lamb*, 13 Wall., 427.)

Afterward, on August 12, 1865, in a suit for partition of the west half of said donation, the same being the part thereof designated by the Surveyor-General as inuring to said Nancy, the Circuit Court for the county of Multnomah set apart the premises in question in severalty to the said Ruth A. (See *Fields vs. Squires, supra*, 391; *Lamb vs. Starr, supra*, 450-53.)

Some question was made upon the admission of the evidence by the defendant as to the title of Ruth A., and therefore this statement of the grounds of it. But I apprehend, the point is not seriously relied on. Indeed, a sufficient answer to it is found in the fact, that the defendant claims under her, and therefore is not at liberty to question her title, subject

to the mortgage and sale thereunder upon the *alias* execution. (2 Green. Ev., §§ 304, 307; *Gaines vs. New Orleans*, 6 Wall., 715.)

Upon this state of facts, the plea of a former adjudication has not a leg to stand on. The proceeding before the Circuit Court, in which it was attempted to apply the money due from the defendant to the plaintiff Ruth A., upon its decree against Eugene Semple, was neither an action nor a suit, but a *mere motion* to correct an error in the proceedings to enforce such decree—to set aside the return of the officer upon the execution, and the entry of satisfaction in the lien docket made in pursuance thereof; because, as it turned out, the supposed sale of the premises to the defendant was no sale, for want of capacity in it to purchase the same or receive the title thereto. The power of the Court to make the order asked for is not questioned, and the subject and the parties were properly before it upon this motion.

But all that was done after this appears to have been done by the Court, *sua sponte*, without either allegations or proofs upon the part of the defendant except this motion and the statement of the account for the occupation of the property by its manager, and none whatever on the part of the plaintiffs. It seems to me, that the Court might as well have attempted to settle or adjust any other account or controversy between these parties upon that motion; as this matter of the rent due the plaintiff Ruth A., from the defendant, for the use of her property.

It is a fundamental rule of law, that a party is not bound or estopped by the judgment of a court as to a matter, point or fact, not within the purview of the proceeding before it, or directly put in issue therein.

In *Woodgate vs. Fleet* (44 N. Y., 13) it is laid down, that "a judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it; and although a decree in express terms purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not con-

clude the parties in reference thereto." To the same effect are *The People vs. Johnson*, 38 N. Y., 63; *Gilbert vs. Thompson*, 9 Cush., 350; 99 Mass., 557; *Manny vs. Harris*, 2 John., 29; *Banks vs. Moreno*, 39 Cal., 238; *Fulton vs. Hanlow*, 20 Cal., 482, 486; 1 Green. Ev., § 528; 1 Phil. Ev., 833; Freeman on Jud., § 271.

If this rent had been due Eugene Semple, the debtor in the decree, and he had, in reply to the motion for leave to issue an *alias* execution, answered and asked that the rent received by the defendant, while a mortgagee in possession, subsequent to the rendition of the decree, might be applied thereon, and that execution issue only for the balance, there would have been some show of legality and justice in the proceeding; but as it was, the plaintiff made no claim or demand in regard to the rent, unless it was to assert, *arguendo*, that it did not belong to Eugene Semple, and therefore could not be applied upon his debt.

The application of the defendant, although it stated the irrelevant fact that the rental value of the property during the time it was in its possession was less than the accruing interest on the decree, asked for nothing more than leave to issue an *alias* execution, because the proceedings on the first were found nugatory.

The plaintiffs made no other answer to the application than to ask to have it stricken from the files, which being denied, the prayer of the motion was allowed, of course. But all that followed in regard to the application of the rent due the plaintiff Ruth A. upon the debt of Eugene Semple, was done without any procedure to base it upon, and rests upon nothing but the will of the Court. It was not necessary, to give the desired relief to the defendant, that any action should have been taken in regard to this rent. When an execution was allowed to enforce the decree, the defendant could ask no more. The money received for the rent of the property was already in its possession. If the plaintiff Ruth A. desired to reclaim it, or recover the value of the use and possession of the premises, she could not be compelled to litigate the matter upon *ex parte* affidavits on the defendant's motion for an *alias* execution; but she had a right to bring an action

against the defendant therefor, when and where she chose and the law permitted, in which the questions of what was the value of the use and occupation of the premises, and was the defendant a mortgagee in possession *with her consent*, and therefore entitled to apply the rents and profits during such possession on its debt, could upon proper pleadings and proofs be formally tried with a court and jury. The proceeding and order in this respect were clearly *coram non judice*.

On the other hand, the extra-judicial character of this order is only equalled by its *injustice*. To fully appreciate this, it is necessary to premise, that in this State the equitable doctrine prevails that a mortgagee has no interest in the mortgaged property, and no right to the possession thereof; that the mortgage is a mere security for the debt, and the right of the mortgagor is limited to a sale of the property and the application of the proceeds upon his debt. (*Anderson vs. Baxter*, 4 Or., 110; *Roberts vs. Sutherlin, Id.*, 222; *Wetherell vs. Wiberg*, 4 Saw., 234.)

The plaintiff, Ruth A., never owed the defendant anything, nor promised to pay it anything. No decree was "recovered" against her for the debt due the defendant, as stated in the affidavit of the manager; and if there had been, it would have been void. She did not join in the note of her husband, but simply mortgaged her property as security for the payment of the same; and the only right that gave the defendant as against her was the right to have the property sold to satisfy the debt upon the decree of a proper Court. In the meantime, and until that was lawfully accomplished, the property was hers, and she had the same right to the occupation and enjoyment of it as if it had never been mortgaged.

True, she might, with her husband's consent, agree that the defendant might enter into possession, and apply the rents and profits upon the debt for which the property was a security. But the defendant could not enter upon the premises as such mortgagee, and take the rents and profits without such consent—and this must appear and be shown by the defendant by some matter independent of and collateral to the mortgage. (4 Saw., *supra*, 240).

In this case, the defendant having attempted to dispose of this property by a judicial sale, failed to do so, because it attempted to purchase the same, when, by law, it was prohibited from doing business in this State. But the plaintiff, Ruth A., was not a party to this unlawful act, and was not affected by it. The property remained hers, just as though there had been no attempt to sell. Yet, the defendant wrongfully assuming that it had become the owner of the premises, entered thereon, and took the rents and profits as its own. In its order, the Circuit Court said the defendant was in possession of said premises as the "mortgagee" of the plaintiffs. If by this, it was meant to declare that the defendant was in possession by *virtue* of the mortgage, or with the *consent* of such plaintiffs, or either of them, then it is a manifest error, because in the affidavit aforesaid of the manager, which is the only evidence that appears to have been before the Court, it is distinctly asserted that the defendant "*took possession of said property under said sale and conveyance, and has retained possession ever since*"—meaning thereby, said void sale and conveyance of July 18, 1874, and May 20, 1875, respectively.

Upon this statement of the case, which is the most that can be said for the defendant, it did not enter as mortgagee at all. It entered without the consent of the mortgagors, but as owner, upon the assumption that it had purchased the property, but in fact, without any right, and as a trespasser. It became liable to the true owner, Ruth A. Semple, for the use and occupation of the premises, as any other trespasser would be, until the subsequent valid sale upon the *alias* execution. The amount due for such occupation was due her, and not her husband. It was her separate property, and in no way liable for his debts or contracts. *She* was under no obligation, either legal or moral, to pay her husband's debt. True, she had pledged certain property for that purpose; but this did not include the use and occupation thereof, which belonged to her, until her title was divested by a valid sale, in pursuance of the mortgage.

It only remains to determine what the value of the premises was during the period. The defendant admits that it

actually received \$4,297 50 rent from the property, exclusive of commissions to agents. But the proof is, that the property was worth \$100 per month.

At this rate, from July 18, 1874, to May 1, 1878, when the defendant ceased to receive rent on one fourth of the property, the rent would amount to \$4,550; and from thence to August 8, 1878, the date when the property was purchased by the manager, the rent, at the same rate for the remaining three fourths, would amount to \$250. Interest upon this sum—\$4,800 at ten per centum per annum, counting from the end of the year in which the rent accrued, is \$600, which added to the principal, makes the sum \$5,400.

From this must be deducted the amount expended during this period by the defendant for legal taxes and necessary repairs. The action for mesne profits is said to be an equitable one, "intended to do justice to the plaintiff, by putting him in as good a situation as he would have held, provided he had not been dispossessed." (Tylor on E., 848.) Taxes paid by the defendant during his wrongful occupancy are to be deducted from the gross rents in ascertaining the actual damage which the plaintiff has sustained by the loss of the possession. *Stark vs. Starr*, 1 Saw. 30.

The amount paid for taxes and repairs was \$1,724 33, to which add \$258 65 interest on the same, and the sum is \$1,992 98, leaving a balance due the plaintiff of \$3,407 02.

The defendant also claims to deduct from this sum the amount paid for insurance—\$530 50. But this expense was not incurred for the benefit of the property, but the defendant. Insurance does not protect property from fire; and, it is said, sometimes enhances the exposure thereto.

This sum was expended by the defendant in its own interest to indemnify itself against a loss of its security by fire; and did not, nor does not, meliorate or improve the condition of the property.

There must be a finding for the plaintiff for the sum of \$3,407 02.

H. Y. Thompson and Todd Bingham, for the plaintiff.

William H. Effinger and Joseph N. Dolph, for the defendant.

Supreme Court of the United States.

MARCH TERM, 1879.

CASE, RECEIVER, vs. BEAUREGARD ET AL.

1. *Partnership Property—Equities of Partners—Preference of Firm Creditors.*—The creditors of a partnership, by derivation from the equities of the partners to have the property of the firm applied to the payment of the partnership debts, have the right to payment of their debts in preference to creditors of individual partners.
2. *Ibid.—Specific Lien of Firm Creditors—Transfer—Preference.*—But there is no specific lien to enforce the payment of such indebtedness, and if the partnership property in any way passes to third persons such equities are extinguished, and the preference is lost.
3. *Ibid.—Sale by Partner of his Interest—Consent of Partners—Creditors—Fraud—Waiver.*—The sale by a partner of his partnership interest with the consent of his fellow-partners, is valid as against general creditors of the firm; or if he sells in fraud of his partners, they may waive the fraud, and creditors cannot object.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Bill to follow, and subject to the payment of a partnership debt;—property which formerly belonged to the partnership. The partnership, while it was in existence, was composed of three persons—May, Graham and Beauregard; but it had ceased to exist before this suit was commenced. It was entirely insolvent, and all the partnership effects had been transferred to others for valuable considerations. None of the property was ever within the jurisdiction of the Court for administration. On the 8th of May, 1867, Graham, one of the partners, assigned all his right and interest in any property and effects of the partnership, and whatever he might be entitled to under the articles thereof, together with all debts due to him from the partnership or any member thereof, to the Fourth National Bank of the City of New York. By subsequent assignments, made on the 14th and 16th of May, 1869, May, the second partner, transferred all his interest in the partnership property to the United States, and by the same instruments transferred to the United States, by

virtue of a power of attorney which he held, the interest of Graham. On the 21st of August, 1867, the United States sold and transferred their interest, obtained from May and Graham, in all the partnership property, including real estate, to Alexander Bonneval, Joseph Hernandez and George Binder. On the 15th of October next following an act of fusion was executed between the New Orleans and Carrollton Railroad Company, Beauregard, Bonneval, Hernandez and Binder, by which the rights of all the parties became vested in the railroad company, subject to the debts and liabilities of the company, whether due or claimed from the lessee or the stockholders. The bill was dismissed, and the complainant appealed.

J. D. Rouse and Charles Case, for Appellant.

Edwin B. Smith, Assistant Attorney General, for the United States.

John A. Campbell, for Appellees.

STRONG, J., after stating the facts:

No doubt the property of a partnership belongs to the firm so long as the firm continues in existence, and not to the individuals who compose the firm. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts, in preference to the debts of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances this equity inures to the benefit of the creditors of the firm. They are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of the several members of the firm. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him; hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. (*Rice vs. Barnard*,

20 Vt., 479; *Appeal of the York County Bank*, 32 Penn. St., 401.)

But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as a partner, a Court of Equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration. It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the Court, and in the course of administration brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodian legis*. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless.

So, if, before the interposition of the Court is asked, the property has ceased to belong to the partnership; if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently, the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors, that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in *Ex Parte Ruffian*, 6 Ves., 119, where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not *mala fide*. (*Kimball vs. Thompson*, 13 Met., 283; *Allen vs. Centre Valley Co.*, 21 Conn., 130; *Ladd vs. Griswold*, 4 Gilman, 26; *Smith vs. Ed-*

wards, 7 Humph., 106; *Robb vs. Mudge*, 14 Gray, 534; *Baker's Appeal*, 21 Penn. St., 76; *Sigler vs. Knox County Bank*, 8 Ohio St., 511, and 11 Ohio, 394.)

The joint estate is converted into the separate estate of the assignee by force of the contract of assignment. And it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him or under an injunction against him. In either case his equity is gone. These principles are settled by very abundant authorities. It remains, therefore, only to consider whether, in view of the rules thus settled, and of the facts of this case, the complainant, through any one of the partners, has a right to follow the specific property which formerly belonged to the partnership, and compel its application to the payment of the debt due from the firm to the bank, of which he is the receiver.

The effect of the transfers set out above, and the act of fusion, was very clearly to convert the partnership property into property held in severalty, or, at least, to terminate the equity of any partner to require the application thereof to the payment of the joint debts. Hence, if, as we have seen, the equity of the partnership creditors can be worked out only through the equity of the partners, there was no such equity of the partners, or any one of them, as is now claimed, in 1869, when this bill was filed. No one of the partners could then insist that the property should be applied first to the satisfaction of the joint debts, for his interest in the partnership and its assets had ceased. (*Baker's Appeal*, 21 Penn. St., 76.)

That was a case where a firm had consisted of five brothers. Two of them withdrew, disposing of their interest in the partnership estate and effects to the other three, the latter agreeing to pay the debts of the firm. Some time after one of the remaining three sold his interest in the partnership property to one of the remaining two partners. The two remaining, after contracting debts, made an assignment of their partnership property to pay the debts of the last firm, composed of the two; and it was held that the creditors of the

first two firms had no right to claim any portion of the fund last assigned, and that it was distributable exclusively among the creditors of the last firm. So in *McNutt vs. Strayhorne*, 39 Penn. St., 269, it was ruled, that though the general rule is that the equities of the creditors are to be worked out through the equities of the partners, yet where the property is parted with by sale severally made, and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and therefore, there is no case for the application of the rule. (See, also, *Coover's Appeal*, 29 Penn. St., 9.) Unless, therefore, the conveyances of the partners in this case and the act of fusion were fraudulent, the bank of which the plaintiff is receiver has no claim upon the property now held by the New Orleans and Carrollton Railroad Company, arising out of the fact that it is a creditor of the partnership, and was such of a partner when the property belonged to the firm.

The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was fraud upon the other partners, if fraud at all, rather than upon the joint creditors—a fraud which those partners could waive, and which was subsequently waived by the act of fusion. Besides, that act made provision for some of the debts of the partnership. And it has been ruled that where one of two partners, with the consent of the other, sells and conveys one half of the effects of the firm to a third person, and the other partner afterward sells and conveys the other half to the same person, such sale and conveyances are not *prima facie* void as against creditors of the firm, but are *prima facie* valid against all the world, and can be set aside by the creditors of the firm only by proof that the transactions were fraudulent as against them. (*Kimball vs. Thompson*, 13 Met., 283; *Flack vs. Charron*, 29 Md., 311.) A similar doctrine is asserted in some of the other cases we have cited. (And see

21 Conn., 130.) In the present case we find no such proof. We discover nothing to impeach the *bona fides* of the transactions by which the property became vested in the railroad company.

Thus far we have considered the case without reference to the provisions of the Louisiana Code, upon which the appellant relies. Article 2823 of the Code is as follows: "The partnership property is liable to the creditors of the partnership in preference to those of the individual partner." We do not perceive that this provision differs materially from the general rule of equity we have stated. It creates no specific lien upon partnership property which continues after the property has ceased to belong to the partnership. It does not forbid *bona fide* conversion by the partners of the joint property into rights in severalty, held by third persons. It relates to partnership property alone, and gives a rule for marshalling such property between creditors. Concede that it gives to joint creditors a privilege while the property belongs to the partnership, there is no subject upon which it can act when the joint ownership of the partners has ceased. Article 3244 of the Code declares that privileges become extinct "by the extinction of the thing subject to the privilege."

What we have said is sufficient for a determination of the case. If it be urged, as was barely intimated during the argument, that the property sought to be followed belongs in equity to the bank, or is clothed with a trust for the bank, because it was purchased with the bank's money, the answer is plain. There is no satisfactory evidence that it was thus purchased. It cannot be identified as the subject to the acquisition of which money belonging to the bank was applied.

The bank has, therefore, no specific claim upon the property, nor is there any trust which a Court of Equity can enforce, and it was well said by the Circuit Justice, that without some constituted trust or lien, "a creditor has only the right to prosecute his claim in the ordinary courts of law, and have it adjudicated before he can pursue the property of his debtor by a direct proceeding" in equity.

Decree affirmed.

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Current Topics.

AN opinion of the Supreme Court of the United States, by STRONG, J., in *Northern Transportation Company vs. City of Chicago*, recently decided, holds that, that cannot be a nuisance, so as to give a common law right of acting therefor, which the law authorizes; that a grant of power to build a bridge or construct a tunnel carries with it, of course, all that is necessary for the exercise of that power; and the city is not liable for construction of such tunnel, unless there has been unnecessary interference with private property in so doing.

THE provision of the new Constitution requiring any Judge of the Supreme or Superior Courts to make affidavit that no cause in his Court remains undecided after submission for ninety days, before he can receive his salary, is undergoing some discussion. It is urged that the affidavit of a Superior Judge must cover the causes submitted to any and all of the other Judges of said Court. A proper construction of the section, taken in connection with others in the article, is, that his affidavit shall refer only to the causes before *him* by distribution.

Now that the new Constitution has been adopted, the attention of the profession is called to the Judiciary Article, published in the JOURNAL, in Vol. III, Page 7. The change is a radical one, and it remains to be seen if the departure will prove beneficial. We think the bar will be quite pleased with the provision requiring that, in the determination of all causes, all decisions of the Supreme Court, either in bank or in departments, shall be given in writing, and the grounds of the decisions shall be stated. Much serious objection has been made to the old system, which made no such requirement.

United States Circuit Court, Ninth Circuit,

[DISTRICT OF CALIFORNIA.]

HERMAN MULLER vs. JOSEPH HENRY *et al.*,

- 1 *Injunction—Contempt.* Certain parties having been enjoined from grading a street until the hearing of the cause, or the further order of the Court, subsequently proceeded to grade the street under authority of a city ordinance, passed after the issuing of the injunction, without first presenting the ordinance to the Court and procuring a dissolution or modification of the injunction. Held: 1. That they were guilty of contempt; 2. That a party can only be relieved from the operation of an injunction, absolutely prohibiting the performance of a specific act, by the Court granting the injunction.

SAWYER, Circuit Judge: After a full examination of the question submitted in this case, in the matter of contempt, and of the authorities bearing on the subject, I am confirmed in the impression, which I had at the hearing, that the parties are in contempt. The order of this Court forbids the defendant, doing certain specific acts, and those very acts they have performed.

The first question presented upon the application for the injunction, was, as to the validity of the ordinance authorizing the grading of the streets mentioned. The Court held that ordinance to be invalid; that it was defective, in consequence of a failure on the part of the Board of Trustees in passing it to pursue the methods prescribed by the statute. Then, there was another question, as to whether or not the work ordered by that ordinance to be done would create a private nuisance. The Court was of opinion, from the evidence adduced, that the case was one in which an injunction should be issued until that question could be determined. After the injunction issued, the Board of Trustees of the city of Napa took proceedings (which, for the purpose of the decision, may be assumed to have been regular) to authorize the grading of the street, which was the thing which the defendants were prohibited from doing by the injunction of

this Court; and, under the authority of that action on the part of the Board of Trustees, without moving this Court to modify the injunction, or to release them from the restraints which it imposed, the parties proceeded with the work.

In *Williamson vs. Camon* (1 Gill and Johnson, page 184) I find a case which I think is directly in point, and which fully sustains the impression which I had at the hearing, and which has been deepened and confirmed by subsequent investigation. In that case, the Levy Court, as it was called, had authorized, by proceedings had for the purpose, the closing of a public road which ran over the lands of the defendant in the injunction suit. The defendant was about to close the road, and an injunction was obtained from the Baltimore County Court, sitting in equity, restraining him from doing so. A writ of *certiorari* had been issued and a review of the proceedings of the Levy Court had in the meantime. It turned out that the proceedings of the Levy Court were invalid for want of formality, and, in consequence of that informality, the proceedings of that Court were reversed. The parties interested then again applied to the proper Court by petition, in the regular course, and obtained another order for the closing of the road, all the parties interested having notice of this application, and appearing to contest it. In pursuance of this authority, supposing that it would protect him from the operation of the injunction, the party enjoined again proceeded to close the road. This, substantially, is an outline of that case. It is rather long, and I shall only cite sufficient of it to show that it is a parallel case with the one now before me. The Chancellor says (page 194):

“At the March term, 1828, the complainants again by their petition stated, that the defendant, disregarding the said injunction, did by his agents, servants and himself, cause the road mentioned in the injunction to be obstructed on or about the 13th of December last, by causing a fence, etc., to be erected, and placing other obstructions on and across the same. etc., as will appear by the affidavits filed at the last term. That although an attachment issued, and was duly served on

the defendant, it had not had the effect of causing him to remove the obstructions then existing; but, as would appear by the annexed affidavit, he had additionally obstructed the said road, etc. Prayer for an attachment against defendant, and that he be compelled to place the said road in the same situation as it was previously to his closing the same on or about the 13th of December last. An attachment was again ordered and issued, returnable forthwith; and was duly served, etc. The defendant appeared and filed his petition, in which he stated, that the proceedings of the Levy Court, in reference to the said road having been set aside by the Baltimore County Court, upon the hearing and examination thereof, under the writ of *certiorari*, which had been issued, etc., as will appear by a transcript of the proceedings exhibited, not upon the merits of the case, but for defect of form"—which is the ground upon which these very proceedings are held to be invalid—"as will appear by a copy of the opinion of said Court. That the petitioner being advised that that part of the said road called the Garrison Forest Road, mentioned in the proceedings, having become a public road and highway, he, together with other petitioners, taxable inhabitants of the county, made a new application to the Levy Court, to alter and close the said part of said road; and that the complainants had notice thereof, and attended a meeting of the commissioners appointed under the said application, and opposed the confirmation of the return made by the said commissioners. That on the 13th of December, 1827, an order was passed by the commissioners of the county, *to whom the powers and duties, heretofore exercised by the Levy Court, has been transferred*, that all that part of the before mentioned road be shut up and closed; and that the petitioner, or any other person or persons, through whose lands the said old road may have been departed from, by such altering, etc., are authorized to shut up and close the same, as by reference to a copy of the said proceedings exhibited will appear. That the complainants had knowledge of said order of the said commissioners, and that the said order being final and conclusive, without appeal, and no writ of *certiorari* having

been applied for, and the said road so authorized to be closed passing transversely through the farm of the petitioner; and the complainants, by the altering of the said road, having another, and a better and shorter road, and the petitioner being greatly aggrieved by the passing of the said road through his lands, and conceiving himself fully authorized to do so by the said order, he, by virtue of the said order, and not, as he avers, in contempt of the Court, did proceed to close the said road; and that he shut up and closed the same without force, etc., and before any attachment had issued against him. That since he has closed the said road he hath removed his inner fences, and planted an orchard on either side of and through the bed of the said road; and that the removal of his fences will be attended with great and irreparable damage to him. Prayer that the said road may be suffered to remain closed, and that he may be released from custody, and that the attachment may be quashed."

Then, there is a long opinion upon the case, of which I shall only stop to read small portions. After stating the circumstances of the case, the Chancellor says: "And it is clear, from what I then said, that I expected to hear again from the defendant, as soon as he had in any manner whatever succeeded in obtaining a final and complete legal authority for closing the road, which the injunction had thus restrained him from obstructing. In short, the whole course of proceedings, antecedently to this period, so far from warranting the inference that the injunction could be virtually dissolved by any other judicial proceedings, shows that it was, notwithstanding any such proceedings, to be considered as in full force until dissolved by this Court itself."

Then, he goes on and states the proceedings again, and says: "It appears, then, by the defendant's petitions of the 3d of January and 22d of April, that he had conceived himself fully and legally authorized to close this highway, by virtue of the order of the Levy Court, notwithstanding the injunction of this Court, which had positively prohibited him from closing or obstructing it in any way whatever; or, in other

words, that the final order he had obtained had virtually, yet effectually and completely, dissolved and annulled the injunction heretofore granted by this Court. The defendant made no application or motion to have the injunction dissolved after the 2d of December, 1826, until the 22d of April last. He has not even deigned to speak of the injunction, in the body of either of those petitions, in which he acknowledges and attempts to justify the closing of the road; and yet, in the first, he asks to be permitted to file an amended answer, and to have the bill dismissed; and in the second, he prays that the road may remain closed, and that he may be discharged from the attachment. If the prayer of his first petition had been literally and fully granted, and the bill dismissed, yet that would not have dissolved the injunction, unless it had been so expressly ordered. By the second petition, this Court is, in effect, gravely asked to make a most extraordinary transit over all its own proceedings, into those of the Levy Court; to approve, and act upon them, and totally disregard its own.

"For, an order of this Court, as prayed, that the road should be suffered to remain closed, and that the defendant should be discharged from the attachment, most manifestly, could stand upon no other foundation than a complete affirmance of the proceedings of the Levy Court, and an entire disregard of all the previous proceedings of this Court. If never before heard of such an indirect mode of obtaining a virtual dissolution of an injunction, by bringing to bear upon it a judicial decision of another and totally different tribunal, not exercising or having any appellate jurisdiction over the Court whence the injunction issued. An injunction, emanating from a competent authority, is a command of the law; and the citizen is, as I have always understood, bound to yield implicit obedience, until the restriction has been removed by the authority which imposed it."

So, in this case, these parties were enjoined from doing a specific thing—from grading this street and filling it up—and they go and get authority from another tribunal, the Board of Trustees of the city of Napa, to go to work and fill

it up, which, if permitted, will virtually, work a dissolution of the injunction of this Court by the said Board.

The Court, in the case cited, proceeds to say: "But, if the position assumed by this defendant be correct, then, instead of obeying or moving to dissolve an injunction, a party may avail himself of various modes of getting around, or under, or over it, without being chargeable with the slightest contempt of the law. The judgment of this Court, continuing the injunction, was founded upon the proof or admission of certain facts, after hearing both parties, as to the very point whether it ought to be continued or not. But, if it could be indirectly and virtually dissolved by a judgment of the Levy Court, upon a different case, then it might be evaded by one party without hearing the opposite party as to the former, or any new facts or equity, which he might be able to show, as a most solid ground for its further continuance. The Court, commanding obedience to an injunction, might thus be brought into collision with another Court, alleged to have sanctioned, or as this defendant has said, *ratified* the acts in disobedience of it, in which conflict of jurisdiction, the rights of persons and of property, it is evident, must suffer, while he who produced the scuffle might escape with the spoils. Surely, such principles, which, to say the least of them, lead so directly to disorder and confusion, ought not to be tolerated for a moment."

So, in this case, if these parties are to go to another tribunal and get an order which may be illegal in itself, and thereby are enabled to "escape with the spoils," and are to experience no trouble from this injunction, certainly disorder and confusion must result from such a state of affairs. "There is absolutely nothing in the prayer of the bill, nor in the writ of injunction itself, which limits the prohibition to a shutting up under the order of the Levy Court, or under any other particular and specified authority whatever." So, in this case, there is nothing in the injunction that refers at all to the particular action of the Board of Trustees; it is simply an injunction preventing them from grading that street—"from depositing any rock, earth, clay, ground, or

other material on" said streets, is the language of the writ—no reference whatever being made to the order of the Board. It is not limited to that; it is not an injunction restraining these parties from doing this work under that order, but an injunction positively and absolutely forbidding their proceeding with it at all.

The Court proceeds: "Neither the terms of the prayer, nor of the writ, make any allusion whatever to any judicial proceedings of any kind then pending, or thereafter to be instituted. The restriction imposed upon the defendant is as general and comprehensive as it could well be expressed. The clear and unequivocal sense of which is, that the road shall continue to be considered as a public road or highway, which the defendant shall not be permitted to close until he shall produce and show to this Court that he had obtained a legal authority to do so. Therefore, the only question now is, whether the acts done by this defendant are such as he was prohibited from doing by the injunction? These acts are the erection of obstructions upon this highway; now these are the very acts which this injunction does most positively and distinctly prohibit."

And so in this case, the injunction was to prohibit these parties from filling up the streets; that is what is stated in distinct terms.

The Court continues: "It is true, that if the injunction had prohibited acts of one description from being done, and the party restrained had done acts of another description, he could not, as the defendant has alleged, be charged with a contempt. The injunction did not prohibit him or any other person from instituting any proceedings, or make any application for the purpose of obtaining a legal authority to close the road." So, in this case, the injunction did not prohibit the Board of Trustees from passing the proper order for the grading of this street. But they did not stop at *that*. The order having been passed, instead of coming to this Court and presenting that order, and showing the fact that they were now in a position to proceed legally and regularly, and obtaining the order of this Court allowing them to proceed,

they defendants assumed the authority to go further, and, without the authority of the Court, to do the very thing which this Court enjoined them from doing.

The Chancellor then proceeds to say: "Most unquestionably, this defendant cannot be allowed to do so, upon his obtaining an authority to close it, until he has first shown that authority to this Court, and upon motion and notice to the opposite party, according to the established practice, obtained a dissolution of that general and unqualified restraint which has been imposed upon him by the injunction. This first cause shown by the defendant for his discharge, being based upon an assumed position not warranted by the proceedings, is therefore deemed insufficient. Indeed, the showing itself seems tacitly to admit the correctness of the charge of contempt, but for that qualification of the injunction which it has assumed, and which has, in fact, no real existence."

Now, that is precisely the position of this case. The parties were grading, or about to grade, this street, assuming to act under the authority of the City Board of Trustees. By injunction issued from this Court they were restrained from carrying on the work—from doing a specific thing. They then went and got another order from the same authority under which they were first acting, as was done in the case which I have just read; and then, without coming to this Court and asking to be relieved from the injunction, on the ground that they now have proper authority, and are proceeding regularly, they undertook to go on and do the specific thing prohibited, and therefore dissolve the injunction granted by this Court, by virtue of proceedings of the Board of Trustees of the city of Napa.

The injunction should be obeyed until it is dissolved by the authority which has granted it. Undoubtedly, if a proper showing were made; if the Court were satisfied that the injunction should be dissolved, it would be dissolved: but until that is done, the party himself has no right to determine the fact that he has authority to proceed, in violation of the injunction of this Court, to perform the acts which have been prohibited.

For the purposes of this motion, it is assumed that the later proceedings of the Board of Trustees are regular in form—that the ordinance upon its face is valid. From an examination of the ordinance, and of the papers submitted, I understand, that no provision has been made for draining off the water when this grade shall be carried out, and thus obviating what is claimed to be a nuisance. If such is the case, although the proceedings of the Board may be regular in form, and an ordinance passed strictly in accordance with the provisions of the statutes, there still might result a private nuisance which the authorities of the city of Napa would not be permitted to create. That is one of the questions which is still left for the determination of the Court, and the only question left for consideration in the case upon which the injunction issued. If it had been made to appear to the Court, after the passage of this recent ordinance, that the grading of the street, without providing for drainage, would not create a private nuisance, the injunction would have been at once dissolved. The Court granted the injunction, because it appeared that a nuisance was likely to be created, and because it appeared that the work was not being done under proper authority; but it does not follow, that even the Board of Trustees of the city of Napa could take proceedings, even though regular in form, and passed in accordance with the modes provided by the statute, to create a private nuisance. In the case of *Spokes vs. The Banbury Board of Health*, (1 Law Reports, Equity Cases, page 49,) the Board of Health, proceeding strictly in accordance with the terms of the law, proceeded to, and did, cut into a stream which ran through the land of a party below, drains which were necessary to the health of the town, to carry off water and filth, thereby rendering the said party's place uninhabitable. The injured party applied for an injunction, and the Court held, in very decided terms, that even though the cutting of the drains were necessary to the health of the town, the authorities could not create such a nuisance, to the destruction of private property.

I only call attention to that case, at this time, in order to

show that there are authorities holding that a private nuisance cannot be committed even by municipal authority, as that is one question still undetermined in this case, assuming the proceedings of the Board of Trustees to be regular in all other particulars. I leave this point open, however, till the hearing.

The defendants must, therefore, be adjudged to be in contempt.

They, however, deny any intention of committing any contempt of this Court, and assert that they resumed and proceeded with the work under advice of counsel that this later action of the Board of Trustees was sufficient authority to justify them in proceeding. I do not suppose that the contempt was willful, and I do not propose to be vindictive in inflicting a penalty. The question of punishment for the contempt was not particularly discussed on the hearing, and I do not know what the actual damage to the complainant has been, as there is no special evidence upon that point, and I am, therefore, not prepared at present to announce the penalty which should be inflicted. In order to enable counsel to prepare and produce evidence as to the amount of damage resulting from the performance of this work, which has been done since the issuing of the injunction, I will continue the matter until Monday, the 12th instant, at 11 o'clock in the forenoon.

May 1, 1879.

B. S. Brooks, for Complainant.

T. I. Bergin and *George W. Towle*, for defendant.

United States Circuit Court.

[DISTRICT OF OREGON.]

MONDAY, OCTOBER 14, 1878.

TERESA E. COULSON vs. BYRON Z. HOLMES ET AL.

1. *Revocation of Will.*—A conveyance of property, previously devised, works a revocation of such devise; and this, where the conveyance is to the devisee, accompanied by a trust in favor of the devisior.
2. *Alteration of Estate.*—A will does not take effect upon an after-acquired estate, and any alteration of the estate of the testator in the premises, after the devise, works a revocation of the will.
3. *Judgment of Probate of Will.*—A Court may determine that certain premises are not within the operation of a certain will, without questioning the validity of such will, or the legality of the judgment admitting it to probate.

DEADY, J.

This suit is brought to establish an alleged trust in certain real property situate in Portland, in favor of the complainant, Teresa E. Coulson, *nee* Holmes, and her two sisters, the defendants, Alice J. Strowbridge and Mary A. Hueston, who, having refused to join in the suit as complainants, are therefore made parties defendant; and for an account of the rents and profits as against the defendant Byron Z. Holmes; and, also, to procure an equal partition of the premises between the plaintiff and said defendants, by a sale thereof and a division of the proceeds.

The bill alleges that at, and long before, March 29, 1870, Thomas J. Holmes, the brother of the plaintiff and the defendants, was the owner of an undivided half of the premises in question, and the defendant Byron Z. the owner of the other such half; that, at the date aforesaid, said Thomas J. executed a conveyance of his interest in the property to the plaintiff, for the expressed consideration of one dollar, but in fact, without any consideration, and in trust for himself; that at and before the date of such conveyance, the said Thomas J. was threatened with an action for seduction, and being of weak mind and greatly under the influence of the

plaintiff, he was induced by the latter to make the same, so as to prevent his property from being taken to satisfy any judgment for damages which might be obtained against him in such action; that the plaintiff accepted such conveyance with a full knowledge and understanding of the purpose with which it was made, but afterward, and upon various pretenses, deferred the reconveyance of said property in pursuance of said trust, with the hope of defrauding the lawful heirs of said Thomas J. of their just rights in the premises, the said plaintiff being well aware that said Thomas J. was not likely to live long; that said Thomas J. died on December 27th, 1875, leaving as his only heirs at law the plaintiff and defendants; that since the date of said death there has been received and appropriated by the plaintiff, from the rents and profits of said premises, the sum of \$600 per month; that said premises are of the value of \$30,000, and consist of lot 2 in block 38, and the southwest quarter of block 16, together with a strip 80 feet long by 5½ feet wide off the west end of lots 3 and 4 of said block, upon which there are valuable buildings; that an equal partition of the same among the parties aforesaid cannot be made in kind without irreparable injury thereto; and, that since the death of the said Thomas J. the complainant has frequently demanded from the defendant Byron Z. a conveyance of her interest in the premises, and an account of the rents and profits thereof, but he has always refused, and claims to own the same absolutely.

The defendants Strowbridge and Hueston do not answer. The answer of the defendant Byron Z. admits the making of the conveyance as alleged, but denies that it was made in trust, and denies all the allegations of the bill as to the causes which induced the execution of the same; admits that since the death of Thomas J. he has received from the property, as rents and profits, about \$12,000, and that the rents now amount to the sum of \$550 per month.

By way of "a further and separate answer," the defendant also alleges, that Thomas J., on February 27th, 1868, duly made and published his last will and testament, whereby he bequeathed and devised to said defendant all his real and

personal property, of whatever nature and kind; that the said Thomas J. died as aforesaid, leaving said will unrevoked; that the conveyance aforesaid was afterward made by said Thomas J. to prevent the possibility of his intentions, as expressed in said will, from being defeated by the loss or destruction of the same, or any improvident disposition which he might otherwise make of his property prior to his death, and not with any intention to revoke said will; and that the same was duly proven in the proper court about April 16th, 1877.

The complainant excepts to so much of the answer as sets up the making and proof of the alleged will, for impertinence, upon the ground that the subsequent conveyance of the same premises operated so far as a revocation of the will.

The law of Oregon, (§ 790, Civ. Code,) following the Statute of Frauds of Charles II, § 6, chap. 3, provides, that "a written will cannot be revoked or altered otherwise" than by another writing, executed by the testator in the same manner, or else by burning, tearing, canceling, obliterating, or destroying the will, with the intent and purpose of revoking the same, by the testator, or in his presence and by his direction.

But, notwithstanding this statute, it has always been held, that a will may be revoked by implication, or inference of law. (4 Kent, 521.)

Among these implied revocations is any act of the testator which alters the estate or interest held by him in the lands devised at the date of the will; as, for instance, a conveyance of the same, or a valid contract to do so. The will takes effect only at the death of the testator. Real property acquired after making the will goes to the heir. If, therefore, the testator is not seized at the time of his death of the same estate, or interest in the premises, that he was at the time of making the will, the same does not pass by the devise, but goes to the heir. (*Ballard vs. Carter*, 5 Pick., 144; *Jettie vs. Picard*, 4 Or., 298.)

This is held either upon the ground that the alteration of the estate is evidence of a change of purpose on the part of the testator; or, more properly, that it works a revocation of

the will by depriving the testator of the estate devised, and thus leaves nothing for the will to operate upon at his death. (*Walton vs. Walton*, 7 John. Ch., 268; *Minuse vs. Cox*, 5 Id., 450; *Herrington vs. Budd*, 5 Denio, 322; *Bosley vs. Bosley*, 14 How., 395; *Ballard vs. Carter*, 5 Pick., 116; *Kean's Will*, 9 Dana, 25; 4 Kent, 528; 2 Am. L. Cas., 668; 2 Green. Ev., § 686; 8 Bac. Ab., 500.)

The statute of this State upon the subject of wills (§ 9) has changed this rule, so far as to provide, that "a bond, covenant, or agreement, * * to convey any property devised or bequeathed in any last will previously made, shall not be deemed a revocation of such previous devise or bequest," but that the same shall pass to the devisee, subject to such bond, covenant, or agreement. A mere agreement, therefore, to convey, no longer works a revocation of a previous devise of the same property; but a conveyance, or other act, which passes the title and produces an alteration in the estate of the devisor, is left by the statute to have the same effect upon a prior devise as before its passage.

The answer of the defendant Byron Z. admits the conveyance of the premises to himself, subsequent to the making of the will; and if such conveyance was absolute, as claimed by said defendant, there could be no question but it operated to revoke the previous devise to him. In that case Byron Z. would hold under the deed, and not the will; because, before the will took effect, (December 27th, 1875,) the testator had conveyed all his interest in the premises to the defendant, and there was then nothing left in the former upon which it could operate or take effect. In such case the devise would be adempt or defeated.

Upon this view of the matter, any reference in the answer to this will, except so far as the personalty is concerned, is certainly impertinent. For, as to the realty conveyed by the deed, the will is non-existent, and of no effect. In *Kean's Will*, *supra*, Patrick Kean devised a tract of land to John Kean, and afterward executed a deed conveying him the same land. The Court held, that Kean took the land under the deed, and not the will; and "consequently, the will was inoperative and void"—that is, so far as the land conveyed

was concerned. But the bill alleges that this conveyance was made in trust for the grantor therein, and unless it was so made, the complaint has no equity. The effect of the convenience upon this view of the transaction, was to pass the legal estate that was in Thomas J., at the time of making the will, out of him and into the defendant, Byron Z., but in trust for the use and benefit of Thomas J. It was said by Lord Mansfield, in *Doe vs. Pott*, (2 Doug. 722,) that the doctrine of revocation by alteration of the estate had been carried to an absurd length in some of the English cases, and in *Ballard vs. Carter*, *supra*, PARKER J., in delivering the opinion of the Court, said, that in assenting to the doctrine—"we would understand by *any alteration* of an estate, a material alteration; one which changes the nature and effects of the seizin of the testator;" and the Court was not inclined "by anticipation, to adopt, as law," such cases as where the alteration was for the express purpose of giving effect to a will, or where an estate was changed to a fee by a common recovery, the testator supposing, when he made his will, that he had a fee, or when the testator, parting with his estate for an instant, took the same estate back again, or conveyed the estate to another for his own use, but would consider them when they arose.

But in *Walton vs. Walton*, *supra*, Chancellor KENT held, that an agreement to sell, being in equity equivalent to a conveyance, was a revocation of a prior devise of the same property—and this, although such an agreement was rescinded, whereby the testator, at his death, held his estate in the lands free from the effect of the act which produced the revocation—substantially as though it had never taken place.

And in *Bosley vs. Bosley*, *supra*, Mr. Chief Justice TANEY states the rule with apparent approval which is deduced from the authorities in 4 Kent, 583, as follows: "The same interest which the testator had when he made his will should continue to be the same interest, and remain unaltered to his death, and that the least alteration in that interest is a revocation." In this case, the legal estate in the premises passed from the divisor to the devisee by the conveyance of March 29th, 1870—according to the answer, abso-

lately, but according to the bill, in trust for the grantor. In the one case, the whole estate having passed from the testator, and none taken back, nothing is left on which the devise can operate, and it must fail, not so much on the ground of revocation, as the want of a subject matter on which to operate. (2 Am. L. Cas., 671.) In the other case, the whole estate passed from the divisor also, but at the same time he took back another estate in the premises—a use to himself. And although this may be said to be substantially the same estate, yet it is technically different. There was an alteration of the estate, and that, according to all the authorities, works a revocation of the devise.

The application of this rule to cases where the conveyance is inoperative and passes no estate, or where by the same instrument or transaction the testator takes back a beneficial interest in the property, doubtless had its origin in the very natural preference which the common law gave to the heir over the devisee—a stranger to the inheritance. In England since 1 Vic., ch. 26 § 23, and in many of the American States, this rule has been modified by statute, so that a conveyance shall not affect the operation of a prior devise upon any interest in the property which the testator had power to devise at his death. (1 Red. on Wills, 833.) Even under this rule, an absolute and unqualified conveyance of the devise, works a revocation of the will *ex necessitate*, but any disposition short of, or other than this, leaves the devise to stand subject to the conveyance. Under these statutes, the legal estate in the premises in controversy would vest in the defendant, Byron Z., at the date of, and by means of, the deed, while the trust estate, or use, given to Thomas J., would also pass to the former, under the will, upon the death of the latter.

If the law were not so well settled otherwise by a long and uniform course of decisions, and if the Oregon statute changing the rule as to agreements to convey had not omitted conveyances therefrom, and thereby indicated the intention of the Legislature to leave them to have the same effect upon a prior devise as before, I should be inclined to hold, that this was a case where the alteration of the estate, being

technical, rather than substantial, is not sufficient to revoke the prior devise, but rather suggests an intention to anticipate or facilitate it by vesting the legal estate in the devisee at once, and leaving the use to pass to him under the will upon the death of the testator.

But this point was not made in the argument for the defendant. Indeed, the ground mainly relied upon for the defense was, that "the question whether the will was revoked or not is a question of *factum*;" and that this question, under the law of Oregon, is in "the first instance exclusively for the Probate Court," and cannot be inquired into collaterally in any other; citing 1 Jarman, 106, 150, 220; 2 Green, Ev. § 680; *California vs. McGlynn*, 20 Cal., 262, and other like authorities.

But, as has been shown, a will may be revoked by implication or operation of law, as well as by the express act of the testator; and the question of revocation in this case is one of law, and not of fact. The inquiry does not touch the validity of the will, nor the legality of the judgment of the County Court admitting it to probate. Therefore, it is not necessary to consider whether by the laws of this State the judgment of such Court is conclusive upon the validity of the will or not. In both *Bosley vs. Bosley* and *Ballard vs. Carter*, *supra*, it was held that the devise was revoked, and that the property passed under the conveyance, and not the will. But it does not appear to have been suggested that that was a collateral, or any attack upon the judgment of the Court admitting the will to probate. In fact, neither the will nor the judgment of the County Court can be affected by the decree of the Court in this suit. At most, the Court will only determine that the premises in question are not within the purview or operation of the will—that the estate of the testator therein, at the time of his death, having been acquired in contemplation of law, after the devise, is not affected by it.

The exceptions are allowed.

John H. Reed and *Sidney Dell* for the complainant.

Eugene A. Cronin and *John Waldo* for the defendant.

Recent Decisions.

FALSE IMPRISONMENT.

A Justice of the Peace issuing a warrant without jurisdiction, is guilty of false imprisonment. (*Truesdell vs. Combs*; Ohio.)

FIRE INSURANCE.

An overvaluation, honestly made, and not intended to deceive or defraud, will not avoid a contract of insurance. (*Planters' Ins. Co. vs. Myers*; Miss.)

INVENTIONS.

A patented invention is not anticipated by a prior device capable of producing the same result but by different processes; nor is a simple, economical machine anticipated by one more complicated and expensive. (*Gottfried vs. Bartholomae*; U. S. Cir. Ct. N. D. Ill.)

ADMINISTRATORS AND EXECUTORS.

Administrator's Right to Real Estate—Landlord and Tenant.—It is not the duty of an administrator to take possession of land of which his intestate died seized, unless the rents and profits thereof are needed in the settlement of the estate; and until he does take possession, the heir may maintain ejectment for the land, although the estate has not been settled and distributed by judgment of the Probate court. If the administrator has not taken possession of the land; if the rent is not needed in the settlement of the estate, and if there is nothing in his relations to the occupant analogous to the relation of landlord and tenant, he cannot maintain an action for use and occupation. (*Filby vs. Carrier*, Sup. Ct. Wis., Wis. Leg. N., Jan. 30, p. 133.)

Ancillary Administration.—In ancillary administration, in Pennsylvania, of the effects of a decedent who was domiciled elsewhere, the Court will pay only such claims as are proved by residents of Pennsylvania, and order the fund to be turned over to the foreign administrator, and non-resident creditors must resort to that jurisdiction. (Barry's Appeal, Foster's Estate. Sup. Ct. Pa., W. N. C., Feb. 6, p. 383.)

Estate of Living Person.—A Probate Court has no jurisdiction to administer upon the estate of a living person, and all proceedings thereto are absolutely void. (*Melia vs. Simmons*, Sup. Ct. Wis., Alb. L. J., March 8, p. 198.)

Public Administrator—Foreign Corporation.—A public administrator in Missouri has no authority to sue a foreign corporation doing business there, upon a contract, not made or to be executed in that State, with a citizen of another State, who neither died, nor resided, nor left any estate, in Missouri. (*Union Mutual Life Ins. Co. vs. Lewis*, U. S. Sup. Ct., Cent. L. J., Feb. 21, p. 145; Ch. Leg. N., Jan. 18, p. 139.)

ADMIRALTY.

Salvage—Depreciation in Value.—A salvor must share the loss by depreciation in value. He is *sub modo* a joint owner, and in the absence of an express contract, he cannot recover, either on the theory of a debt due the owner, or a lien to be satisfied, at all hazards, to the full extent of the proceeds in the registry. (The Carl Schurz, U. S. Dist. Ct. West Dis. Tenn., Cent. L. J., Feb. 21, p. 146.)

AGENCY.

Declarations of Agent—Res Gestae.—The declarations of an agent, to be admissible and bind the principal, must be made at the time of the transaction, and be a part of the *res gestae*. (*Austin vs. Austin*, Sup. Ct. Wis., Wis. Leg. N., Feb 6, p. 146.)

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Current Topics.

THE following persons were admitted to practice, on the 13th day of May, by the Supreme Court of this State, as attorneys and counselors, after a close and critical examination: Mary Josephine Young, Horace G. Platt, R. H. F. Variel, John M. Gregory, Chas. C. Paulk and J. C. B. Hebbard. Mrs. Young is the wife of J. N. Young, a prominent attorney at Sacramento, and she has the honor of being the first woman in this State who has obtained a license to practice law from the Supreme Court. We are informed that she passed an exceedingly satisfactory examination, and is worthily entitled to the honors thus placed upon her, without partiality or undue gallantry. The problematic question of the success of female practitioners, it seems, will soon be practically settled.

THE members of the bar of this city are discomfited at the anticipated early adjournment of the Courts for a vacation for two months. There are a few practitioners who will make no objection to so early an adjournment, but to the great body of the profession so early and so continued a vacation will prove a severe loss. They, in a legal and reasonable sense, have a right to expect the Courts to be open for a full transaction of business, something more than nine or ten months in a year, with sessions aggregating three to four hours per day. The labors of the judges are truly excessive, but it must be presumed that these things were duly considered in connection with the good salaries to be paid, when they consented to serve the public. Their labors, however, are not more arduous than those of the bar.

OUR subscribers are too impatient. It is true, many weeks have passed since our Supreme Court has filed a written opinion, yet no censure should be indulged in. The judges are working hard, and propose to give each case mature deliberation, notwithstanding the hint thrown out by the ninety days provision of the New Constitution.

WE call attention to the following cases appearing in this issue: *Armstrong vs. Beadle et al.*, in which Judge Sawyer, of the U. S. Circuit Court, for the district of California, holds that the statute of California giving a right of action for negligence, resulting in death, has no extra-territorial application; *Jennison vs. Kirk*, a decision by the U. S. Supreme Court, respecting ditch and canal owners, under the act of Congress of July 26th, 1866, and *United States vs. Macon County*, respecting municipal bonds.

THE Supreme Court of the United States, at its present term, in the case of *Bart vs. Panjaud*, held: 1. Though an objection to a juror as legally disqualified be improperly overruled, the error is cured if it appears affirmatively that he was not on the jury when the case was tried, and it does not appear that the party's right of peremptory challenge was abridged in getting him off. 2. A man offered as a juror is, no more than a witness, compelled to disclose under oath his guilt of a crime which would disqualify him. The party relying on such disqualification must prove it by other evidence if the juror declines to answer. 3. In an action of ejectment or trespass to land, actual possession, or receipt of rent by plaintiffs prior to eviction, is *prima facie* evidence of title, on which recovery can be had against a naked trespasser. (Citing *Hutchinson vs. Perley*, 4 Cal., 33; *Nagle vs. Massey*, 9 Cal., 426.) Mr. Justice FIELD concurring, says: "I agree with the Court that the juror Holmes, in this case, could not be required to answer the questions put to him; but I go further. I do not think that the act of Congress, which requires a test oath as to past conduct, and thereby excludes a great majority of the citizens of one half the country from the jury box, is valid. In my judgment the act is not only oppressive and odious and repugnant to the spirit of our institutions, but is unconstitutional and void. As a war measure, to be enforced in the insurgent States when dominated by the national forces, it could be sustained; but after the war was over, and those States were restored to their normal and constitutional relations to the Union, it was as much out of place, and as inoperative as would be a law quartering a soldier in every Southern man's house. Mr. Justice STRONG dissents on the ground that the evidence of plaintiff's possession was not sufficient to raise the presumption of title.

United States Circuit Court, Ninth Circuit,

DISTRICT OF CALIFORNIA.

JOHN ARMSTRONG vs. DONALD BEADLE *et al.*

1. *Action for Death by Negligence.* The Statute of California giving a right of action for negligence, resulting in death, has no *extra-territorial* operation.
2. *Same, High Seas.* Death, resulting from negligence, on the high seas is not within the statute.
3. *Right, not Remedy.* The statute gives a new right of action, not merely a remedy for an existing right.

SAWYER, Circuit Judge: The complaint alleges, that the plaintiff and his wife took passage upon the steamer "Eastport," owned by the defendants, at Empire City, in the State of Oregon, for San Francisco, in the State of California; that on the voyage the steamer, near Point Arena, struck a rock, and settled down in the water and became immovable; that plaintiff's wife afterward entered a surf boat, by direction of the master, whereupon one end of the boat fell suddenly into the sea, in consequence of the negligence of those in charge, and plaintiff's wife was precipitated into the sea and drowned. The action is brought under section 377 of the Code of Civil Procedure, for damages sustained by the loss of the wife. The provision is, that "When the death of a person is caused by the wrongful act or neglect of another, his heirs, or personal representatives may maintain an action for damages against the person causing the death." The answer admits the principal facts; but alleges, that while said steamship was proceeding on her voyage, and *on the high seas*, the said steamship was, by the perils and accidents of the seas, forced and cast upon a rock, whereby the ship and cargo became a total loss, and the death of plaintiff's wife thereby occurred without the privity or knowledge of defendant. Other facts were alleged, designed to bring the case within the provisions of section 4283 of the Revised Statutes of the United States. The

plaintiff demurs to this answer, on the ground that it does not state facts sufficient to constitute a defense.

The first point presented is, that the statute has no extra-territorial operation, and is limited to accidents occurring within the territorial jurisdiction of the State; and as the death occurred upon the high seas, beyond the legislative jurisdiction of the State, the statute is inapplicable. There was no liability at common law for the death of a party, resulting under circumstances like those set out in the complaint; and unless the statute in question gives the right of action, the plaintiff cannot recover. The statute, undoubtedly, creates a new right of action, and does not merely give a remedy for a right already existing. If it operates beyond the territorial jurisdiction of the State, then it becomes a universal law, applicable to all countries, and the Legislature of California would be adopting a code of laws affecting the rights of parties arising out of acts done wholly in foreign countries. If California can pass laws of the kind, operating extra-territorially, then other States and countries can pass laws upon the same subject operating in California, and these laws may be in conflict; but there is nothing in the statute to indicate that it was intended to operate beyond the limits of the State. After giving a synopsis of the statutes of the several States which have legislated on the subject, Shearman and Redfield, in their work on negligence, state the rule, as to their effect, as follows:

"The operation of these statutes is limited to the territory of the States which have enacted them. No action can be maintained upon one of these statutes, if the deceased person received the fatal injury at a place not within the limits of the State by which such statute was enacted, whether such place be in another State, *or upon the high seas.*" (Sec. 296.) The rule as stated is fully sustained, both by reason and the authorities. (*Whitford vs. Panama Railroad Co.*, 23 N. Y. 465; *Meahlar vs. N. & N. Y. T. Co.*, 35 N. Y. 352; *Needham vs. Grand Trunk R. R. Co.*, 38 Vt. 295; *Selma, R. & D. R. Co. vs. Lacy*, 43 Geo. 461; *S. R. & D. R. Co. vs. Lacy*, 49 Geo 107; *Woodward vs. M. S. & N. Ind. R. Co.*, 10 Oh. St.

122.) In the latter case, where the death resulted from negligence in Illinois, the statutes of which State gave a right of action for the death to the administrator, the Court go so far as to hold, that the statute of Illinois can have no operation in Ohio, and that the action, though maintainable in Illinois, cannot be maintained in the State of Ohio. So, in Massachusetts, it is held that the action upon the statute cannot be maintained outside of the State enacting it. In this case, it appears both from the complaint and answer, that the negligence complained of, and the death occurred upon the high seas, outside of the territorial jurisdiction of the State. It is, therefore, not within the operation of the statute.

There was a total loss of vessel and cargo, except as to three hundred dollars, for which the wreck was sold by the underwriters after abandonment, and whatever insurance money was due. This case is, undoubtedly, within the provisions of section 4283 of the Revised Statutes of the United States, limiting the liability of owners of vessels, as it was engaged in inter-state and foreign commerce. (*Lord vs. Goodall, Nelson and Perkins Steamship Co.*, 4 Sawyer 292.) But, as it is held that the case is not within the statute, and there is no liability at all, it is unnecessary to consider the other points, as to whether there can be a recovery to the extent of the insurance money, or the three hundred dollars for which the wreck sold.

Demurrer overruled.

May 12, 1879.

T. P. Ryan for Plaintiff.

Andros & Page for Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1878.

(No. 199.)

S. JENNISON, EXECUTOR OF R. B. TITCOMB,

VS.

J. T. KIRK.

1. The ninth section of the act of Congress, of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," enacts: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: Provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage;" *Held*, 1st, that this section only confirms to the owners of water-rights and of ditches and canals on the public lands of the United States the same rights which they held under the local customs, laws and decisions of the Courts, prior to its passage; and, 2d, that the proviso confers no additional rights upon the owners of ditches subsequently constructed; but simply renders them liable to parties on the public domain whose possessions may be injured by such construction.
2. The origin and general character of the customary law of miners stated and explained.
3. By that law the owner of a mining claim and the owner of a water-right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.
4. By that law a person cannot construct a ditch to convey water across the mining claim of another, taken up and worked according to that law before the right of way was acquired by the ditch owner, so as to prevent the further working of the claim in the usual manner in which such claims are worked, nor so as to cut off the use of water previously appropriated by the miner for working the claim, or for other beneficial purposes.
5. Accordingly, where the owner of a mining claim worked by the method

known as "the hydraulic process," cut and washed away a portion of a ditch so as to let out the water flowing in it, the ditch having been so constructed across the claim previously acquired as to prevent it from being further worked by that method, and to prevent the use of water previously appropriated by him; *Held*, that the cutting and washing away of the ditch, it having been done in order that the claim might be worked and the water used as before, was not an injury for which damages could be recovered.

Error to the Supreme Court of California.

Mr. Justice FIELD delivered the opinion of the Court.

In 1873, the plaintiff's testator constructed a ditch or canal in Placer County, California, to convey the waters of a cañon and of tributary and intermediate streams, to a mining locality known as Georgia Hill, distant about seventeen miles, for mining, milling and agricultural purposes, and for sale. The ditch was completed in December of that year, and immediately thereafter the waters of the cañon were turned into it. The ditch had a capacity to carry a thousand inches of water, and it is alleged that during the rainy season of the year in California, which extends from about the first of November to the first of April, the cañon, tributaries and intermediate streams would supply that quantity, and during the dry season not less than one hundred inches. The intention of the testator, as declared on taking the initiatory steps for their appropriation, was to divert two thousand inches of the waters by means of a flume and ditch.

In its course to Georgia Hill, the ditch crossed a gulch or cañon in the mountains known as Fulweiler's gulch, the waters of which had been appropriated some years before by the defendant, who had constructed ditches to receive and convey them to a reservoir, to be used as needed. One of these ditches in the gulch was intersected by the ditch of the testator, and the waters which otherwise would have flowed in it were diverted to his ditch. The defendant thereupon repaired and reopened his own ditch, turing into it the waters which had previously flowed in it, and in so doing cut and washed away a portion of the ditch of the testator, so as to let out the waters brought down from the cañon above and the intermediate streams. It is for alleged damages thus

caused to the testator, and to restrain the continuance of the alleged injury to his ditch, and any interference with its use, that the present action was brought.

The defendant not only justified the cutting of the testator's ditch in the manner stated, because necessary for the repair and reopening of his own ditch, and to retain the waters of the gulch previously appropriated and used by him, but on the further ground that the ditch of the testator traversed mining claims owned many years before by him, or those through whom he derived his interest, and would prevent their being successfully worked.

It appears, from the answer, which the Court finds to be correct in this particular, that for many years prior to this action, the defendant, or his grantors and predecessors in interest, had been in the possession of a portion of Fulweiler's gulch, extending from a point about 1,200 feet below the crossing of the testator's ditch to a point about 1,200 feet above it, including the bed of the gulch and fifty feet of its banks, on each side; that during this period the ground was continuously held and worked for mining purposes, and as a mining claim, in accordance with the usages, customs and laws of miners in force in the district; that in working the claim and extracting the gold, the method employed was what is termed "the hydraulic process," by which a large volume of water is thrown with great force through a pipe or hose upon the sides of the hills, and the gold-bearing earth and gravel are washed down, and the gold so loosened that it can be readily separated; and that the ditch of the testator traversed the immediate front and margin of this gold-bearing earth and gravel, rendering the same inaccessible from the outlets of the gulch, down which they would be washed, thus practically destroying, if allowed to remain, the working of the mining ground.

On the argument, it was admitted, that the defendant's right of way for his ditch was superior to the testator's right of way for the one owned by him, being earlier in construction, and the waters of the gulch being first appropriated; and, therefore, that the duty rested upon the testator, and since his death, upon his executor, to so adjust the crossings

of the ditches as not to interfere with the full use and enjoyment, by the defendant, of his prior right. It was contended that such crossings had been so adjusted by the testator, but were destroyed by the defendant.

It was also admitted, that the extension of the testator's ditch, at the place where it was constructed across the claim of the defendant, prevented the successful working of the claim; but as the land over which the ditch passed, and on which the claim is situated, is a portion of the public domain of the United States, it was contended that the right of way for the ditch was superior to the right to work the claim; and that such superior right was conferred by the ninth section of the act of Congress of July 26th, 1866. That section enacts: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: Provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

The position of the plaintiff's counsel is, that of the two rights mentioned in this section, only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws and decisions of the Courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water-right, and is not subject in its enjoyment to the local customs, laws and decisions. This position, we think, cannot be sustained. The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs,

laws and decisions of the Courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and cañons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system, and of fair-dealing, which are the prominent characteristics of our people. In every district which they occupied, they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines, distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery followed by appropriation as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the Government, he was re-

garded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through cañons and ravines to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State Courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and moulded by the Courts, and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be

prescribed by law and the local customs, or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz-bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterward acquired; the intention expressed was to secure them by a patent from the Government. The senator of Nevada,* the author of the act, in advocating its passage in the Senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the Government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and when not in conflict with the constitution or laws of the State, or of the United States, should govern their determination; and a series of wise judicial decisions had moulded these regulations and customs into "a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes." The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself under the implied sanction of a just and generous Government. And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation subject to legislation by Congress and to local rules. It merely recognized the obligation of the Government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but

* Hon. Wm. M. Stewart.

sanctioned, regulated and confirmed a system already established, to which the people were attached.*

These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act.

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the State and moulded by its Courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws and decisions, would be thereby destroyed unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purports in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws and decisions of the Courts; and the second clause declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," cannot be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section confers no additional rights upon the owners of ditches subsequently constructed; it simply renders them liable to parties on the public domain whose possessions may be injured by such construction. In other words, the United States by the section say, that whenever rights to the use of water by priority of possession have

* Cong. Globe, 1st Session, 39th Cong., Part IV, pp. 3225-3228.

become vested, and are recognized by the local customs, laws and decisions of the Courts, the owners and possessors shall be protected in them; and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, "is acknowledged and confirmed;" but where ditches subsequently constructed injure by their construction the possessions of others on the public domain, the owners of such ditches shall be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the Government to possessory rights acquired under the local customs, laws and decisions of the Courts.

This view of the object and meaning of the ninth section was substantially taken by the Supreme Court of California in the present case; it was adopted at an early day by the Land department of the Government, and the subsequent legislation of Congress respecting the mineral lands is in harmony with it.*

By the customary law of miners in California, as we understand it, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with, or material impairment of each other, the enjoyment of both is allowed. In the present case, the plaintiff admits that it was incumbent upon the testator or himself to so adjust the crossing of the two ditches that the use of the testator's ditch should not interfere with the prior right of the defendant to the use of the water of the gulch; and it would seem that so far as the flow of water was concerned, this was done. Had there been nothing further in the case, the claim of the plaintiff would have been entitled to consideration. But there was much more in the case. The chief value of the water of the gulch was to enable the defendant to work his mining claim by the hydraulic process.

*Letter of Commissioner Wilson of Nov. 23, 1869; Copp's U. S. Mining Decisions, 24; Acts of Congress of July 9, 1870, and May 10, 1872, Revised Stats., title 32, chap. 6.

The position of the testator's ditch prevented this working; and thus deprived him of this value of the water, and practically destroyed his mining claim. No system of law with which we are acquainted tolerates the use of one's property in this way, so as to destroy the property of another. The cutting and washing away of a portion of the testator's ditch, by the defendant, this having been done "in the exercise, use, and enjoyment of his own water rights, in the usual and in a reasonable manner," as found by the Court, and in order that his claim might be worked as before, was not, therefore, an injury for which damages could be recovered.*

Judgment affirmed.

*NOTE.—The customary law of miners, as stated in the opinion, is not applicable in California to controversies arising between them, or ditch owners, and occupants of the public lands for agricultural or grazing purposes. It has been the general policy of the State "to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner." (*Tartari vs. Spring Creek Co.*, 5 Cal., 398.) But at an early day an exception was made to this policy in cases where the interests of agriculturists and of miners conflicted. By an act passed April 20th, 1852, a right of action was given to any one settled upon the public lands for the purpose of cultivating or grazing against parties enterfering with his premises, or injuring his lands, where the same were designated by distinct boundaries, and did not exceed one hundred and sixty acres in extent; with a proviso, however, that if the lands contained mines of precious metals, the claim of the occupant should not preclude any persons desiring to do so from working the mines "as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes. (Statutes of 1852, p. 158.)

Under this act, the Supreme Court of the State held that miners, for the purpose simply of mining, could enter upon the land thus occupied, but that the act legalized what would otherwise have been a trespass, and could not be extended upon by implication to a class of cases not specially provided for. Accordingly, ditches constructed over lands thus held, without the consent of the occupant, though designed to convey water to mining localities for the purpose of mining, were held to be nuisances, and upon the complaint of the occupant were ordered to be abated. (*Stoakes vs. Barrett*, 5 Cal., 37; *McClinton vs. Bryden*, *Ibid.*, 97; *Fitzgerald vs. Urton*, *Ibid.*, 308; *Burge vs. Underwood*, 6 *Id.*, 46; *Wermer vs. Lowery*, 11 *Id.*, 104.)

Since these decisions there has been some legislation in the State permitting water to be conveyed, upon certain conditions, across the lands of others. Such legislation, if limited to merely regulating the terms upon which possessory rights, subsequently acquired, on the public lands in the State may be enjoyed in the absence of title from the United State, may not be open to objection.

[No. 98.]

UNITED STATES *ex rel.* vs. MACON COUNTY.

MUNICIPAL BONDS—LEVYING TAX—MANDAMUS.

Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. If it gives no power to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. This Court has no power to compel the levy of a tax which the law does not authorize.

Where the statute provides that the tax shall not exceed a certain sum annually, there is no power to compel the levy of a greater amount.—
[*Ed. Legal News*

WAITE, C. J. In *United States vs. County of Clark*, (96 U. S. 211,) we decided that bonds issued by counties under section 13 of the act to incorporate the Missouri and Mississippi Railroad Company were debts of the county, and that for any balance remaining due on account of principal or interest after the application of the proceeds of the special tax, authorized by that section, the holders were entitled to payment out of the general funds of the county. In *Loan Company vs. Topeka*, (20 Wall., 660,) we also decided, that "it is to be inferred, when the Legislature of a State authorizes a county or city to contract a debt, by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

When the act to incorporate the Missouri and Mississippi Railroad Company was passed, the power of counties in the State to tax for general purposes was limited by law to one half of one per cent. on the taxable value of the property in the county. (Rev. Stat. Mo., 1865, p. 96, sec. 7; p. 121, sec. 76.) This limit has never since been increased, and the Constitution of 1875, which is now in force, provides that this tax shall never exceed that rate in counties of the class

of Macon. (Art. X, sec. 11.) If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the Legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one twentieth of one per cent., and the case is thus brought directly within the maxim, *expressio unius est exclusio alterius*.

Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter, by general or special acts, be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated, and when the debt was incurred. The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with the notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to

bring existing powers into operation. In this case, it appears that the special tax of one twentieth of one per cent. has been regularly levied, collected and applied, and no complaint is made as to the levy of the one half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order.

Our attention has been directed to the general railroad law in force when the Missouri and Mississippi Railroad Company was incorporated, and when the bonds in question were issued; and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscriptions authorized by that act, which require the assent of two thirds of the qualified voters of the county. Under such circumstances, it seems to have been considered proper to allow, substantially, unlimited power of taxation to pay a debt which the voters had directly authorized. In this case no such assent by the voters was required, and the tax-payers were protected against the improvident action of the official authorities by a limit upon the amount they should be required to pay in any one year. The general railroad act was in force when this company was incorporated, but its provisions seem not to have been satisfactory to the corporators. They wanted authority for counties to subscribe without an election, and on that account accepted the terms which were offered. As the bondholders claim under the corporation, they must submit to the conditions as to taxation which were substituted for those that would otherwise have existed.

We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand, and of the amount that is due, but it gives him no new rights in respect to the means of payment.

This disposes of the case, and without answering specifically the questions that have been certified, we affirm the judgment.

Recent Decisions.

ASSAULT.

Constructive Assault—Infecting with Venereal Disease.—No action will lie by a woman who consents to sexual intercourse, against the man for constructive assault and infecting her a venereal disease. (*Hegarty vs. Shine*, Irish Ct. App., Cent. L. J., Feb. 7, p. 111.)

ASSAULT AND BATTERY.

Punishment by School-teacher.—A teacher may inflict a reasonable punishment, and the presumption is, that the punishment inflicted was reasonable; but punishment with a rod, which leaves marks or welts on the pupil for two months, or a much less time, is immoderate. A parent cannot excuse a pupil from attending at certain hours, and from particular studies prescribed by the rules; but a failure is not the subject of corporal punishment, but of expulsion. (*The State vs. Myner*, Sup. Ct. Iowa, West. Jur., March 19, p. 107.)

ATTACHMENT.

Mortgaged Chattels.—In order to justify an attachment of mortgaged chattels which have been replevined by the mortgagee, the officer must show that he acted for a creditor of the mortgagor, and the debt must be proved. The process of attachment is not sufficient justification. (*James vs. Van Duyn*, Sup. Ct. Wis., Wis. Leg. N., Feb. 6, p. 142.)

BANK.

Liability as Collecting Agent—Failure of Correspondent.—A bank sending a note to a correspondent for collection, who collects it, but becomes insolvent and fails to pay over the proceeds, is liable to the holder for such default. (*Indig vs. National City Bank of Brooklyn*, Sup. Ct. N. Y., Alb. L. J., Jan. 11, p. 31; Texas L. J., Feb. 5, p. 361.)

National Banks—Loans on Real Estate Security.—Although

national banks are prohibited from loaning money on real estate security, such contracts are not void as *ultra vires*, but may be enforced. (*Union National Bank vs. Matthews*, U. S. Sup. Ct., Alb. L. J., Feb. 15, p. 132; Cent. L. J., Feb. 14, p. 131; Texas L. J., Feb. 26, p. 402; Int. Rev. Rec., March 3, p. 63; Monthly Jur., March 3, p. 673; Rep., Feb. 26, p. 257.)

Who are Depositors—Corresponding Banks.—A bank which was in the habit of forwarding to another bank notes, bills, etc., for collection, the proceeds of which were placed to its credit and forwarded once a week, though they might have been drawn out at any time, is not entitled to come into a distribution of the second bank's assets, upon its bankruptcy, as a depositor, under the Pennsylvania law, (*Parkesburg Bank's Appeal*. Sup. Ct. Pa., W. N. C., Feb. 13, p. 394.)

BANKRUPTCY.

Fraudulent Conveyance—Assignee.—An assignee in bankruptcy may maintain a bill in equity in the State Courts to set aside a fraudulent conveyance of the bankrupt's real estate. (*Johnson vs. Helmstaedter*, N. J. Ch. Ct., N. J. L. J., Jan., p. 11.)

What Debts are Provable—Contingent Liability.—Where an outgoing partner takes a bond from the other members of the firm, conditioned that they will pay all the firm debts, and they subsequently became bankrupt and obtain a discharge in bankruptcy, and the obligee is compelled to pay some of the firm indebtedness, *held*, that the bond was a provable debt, and that the discharge may be pleaded in bar. (*Fisher vs. Lift*, (note,) Sup. Ct. R. I., Am. L. Reg., Jan., p. 9.)

COMMON CARRIER.

Loss of Passengers' Baggage—Liability.—A common carrier of passengers is liable for the loss of personal baggage kept by a passenger exclusively within his own control, if lost by the negligence of defendant's servants and without plaintiff's fault. It is no defence that the sleeping-car in which it was lost is not the property of defendant. (*Kinsley vs. Lake Shore*, etc., R. Co., Alb. L. J., Feb. 8, p. 113.)

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Current Topics.

A FEW days ago, our Supreme Court decided that the Judge of a Court may imprison an attorney for contempt, for refusing to defend a prisoner without compensation, after being commanded by the Court. This practically settles a question about which there has been considerable doubt, ever since the decision in *ex parte Yale*, (24 Cal., 241,) holding that an attorney is not an officer of the Court.

IN *Hartell vs. Tilghman*, the Supreme Court of the United States have recently held: 1. A suit between citizens of the same State cannot be sustained in a Circuit Court of the United States as arising under the patent laws, where there is no denial of the validity of plaintiff's patent, where its use is admitted, and where a subsisting contract is shown governing the rights of the parties in the use of the invention. 2. Relief in such an action is founded on the contract and not on the patent laws of the United States.

THE Governor of New York refused to sign the bill, embodying nine supplemental chapters to the Code of Civil Procedure of that State, and the Senate sustained the veto. The Civil Code, it is anticipated, will meet the same fate. There are many people who look on codification with disfavor, and whilst our own system has had its many advocates and supporters, there lurks in the minds of many of our good lawyers objections, serious objections, entertained after close practical observations.

INTERESTING TO PRE-EMPTORS.

In a case arising in San Francisco Land District, (*Walker vs. McClendon*,) the Commissioner of the General Land Office of the United States, (in a decision just received,) on appeal to him from the Register and Receiver, has applied the principles established by the Supreme Court of the United States in *Atherton vs. Fowler*, (96 U. S., 513,) and affirmed by the same Court in *Hosmer vs. Wallace*—reported in our issue of April 5, 1879.

In *Atherton vs. Fowler*, it was held that a pre-emption settlement could not be made on land enclosed and occupied by another—no matter if that other person had no legal right of possession.

In that case, the plaintiff's testator had a tract of about 2,000 acres in possession and enclosed, claiming under the Suscol grant. March 22, 1862, the grant was finally decided, by the United States Supreme Court, to be invalid. In March, 1863, Congress passed an Act giving to such claimants, under that grant, the right to enter by pre-emption the lands bought and occupied by them, severally, under the grant.

But before this, and while plaintiff occupied the land without any legal title or right whatever, to wit, in August or September, 1862, (*Vide Page vs. Fowler*, 28 Cal., 607,) "the defendants entered upon the land, the fence being down in places, or so as to leave gaps from two to three hundred feet in length," * * * "each of them claiming the right to enter upon and hold a quarter section of land under the pre-emption laws of the United States."

After reciting the instructions asked, given and referred by the District Court which tried the case, the United States Supreme Court says, (p. 515, 16,) "In short, it is obvious that the case was made by the Court to turn on the assumption that the land was, in its then condition, liable to be pre-empted by defendants, against the wishes of plaintiff." After discussing this topic at length, the Court goes on to say,

that, even if the grant purchasers were not themselves entitled to pre-empt the land which they had enclosed, improved and occupied, others could not take it under the pre-emption laws. Under those laws, the Court say: "The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land."

In conclusion, the Court say: "It follows that the defendants could not have made any lawful entry on the lands where the hay was cut in this case; that no law existed which gave them any right to make such an entry; that they were mere naked trespassers, making an unwarranted intrusion upon the inclosure of another—an inclosure and occupation of years, on which time and labor and money had been expended, and that in such a wrongful attempt to seize the fruits of other men's labor, there could be no *bona fide* claim of right whatever. The instruction of the Court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous, and the judgment founded on it must be reversed."

In *Hosmer vs. Wallace*, (*Vide*, PACIFIC COAST LAW JOURNAL of April 5, 1879, p. 119,) the same Court says, (p. 123,) "To create a right of pre-emption, there must be settlement, inhabitation and improvement by the pre-emptor, conditions which cannot be met when the land is in the occupation of another. Settlement, inhabitation and improvement of one piece of land can confer no rights to another adjacent to it, which, at the commencement of the settlement, is in the possession and use of others, though, upon a subsequent survey by the Government, it proved to be part of the same sectional subdivision. Under the pre-emption laws, as held in *Atherton vs. Fowler*, (96 U. S., 516,) the right to make a settlement is to be exercised in unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling-house is to be exercised on vacant land; none of

"these things can be done on land when it is occupied and used by others."

In *Walker vs. McClendon*, cited above, the Commissioner of the General Land Office applies the principle laid down in *Atherton vs. Fowler*, and holds that the settlement of Walker, made on lands enclosed by, and in the possession of another, was invalid, and gave, and could give, no rights under the pre-emption laws. He then even goes so far as to say, that the relinquishment of his homestead by McClendon, being made after the trial and adverse decision of the Register and Receiver, under the erroneous impression that the decision of the Register and Receiver was correct, holding the pre-emption settlement above described to be valid, will not be regarded, and his homestead claim will be kept intact.

United States District Court,
DISTRICT OF CALIFORNIA.

THE SCHOONER "COLUMBUS."

MARITIME LIENS. No lien exists in favor of a material man who has supplied a vessel in her home port at the request of her master, after having been notified by the owner that the vessel had been let to the master to be run on shares, and to be manned and victualled by him, and that if supplies are furnished to her, it must be exclusively on his personal credit.

HOFFMAN, J.

The question to be determined in this case is—Does a lien exist in favor of a material man who has supplied a vessel in her home port at the request of her master after having been notified by the owner that the vessel has been let to the master to be run on shares—and to be manned and victualled by him, and that if supplies are furnished to her, it must be exclusively on his personal credit.

The Supreme Court has decided in the case of the *Lottawanna*, (21 Wall., 585,) that under the general maritime law,

as received in the United States, no lien exists in favor of a material man, who supplies a vessel in a port of the State in which her owner resides; but, that where the State laws create a lien for such supplies, it may be enforced in the Admiralty Courts of the United States.

The inquiry, therefore, in the present case is, does the statute of this State create such a lien?

Section 813, of the Code of Civil Procedure, provides:

"All steamers, boats and vessels are liable.

"1. For services, etc.

"2. For supplies furnished in this State for their use at the request of their respective owners, masters, agents or consignees. * * * Demands for these several causes constitute liens upon all steamers, vessels and boats, and have priority in the orders herein enumerated over all other demands; but such liens continue in force for the period of one year."

In the case of *The Young Mechanic*, (2 Cart. R., 504,) Mr. T. Cartes considered very carefully the nature and effect of a similar lien created by the laws of Maine.

He held, that it was a maritime lien, conferring a *jus in re* and constituting an incumbrance on the property, and existing independently of the process used to execute it.

He further held, that the statute conferred on mechanics and material men, such a lien on domestic vessels as the general admiralty law had previously allowed to them on foreign vessels.

Of course, it was not intended by this decision to hold, that the liens were identical in every respect. The State laws may prescribe the mode in which the lien they create may be acquired or perfected. They may also limit their continuance to a specified period.

But, except where the State laws otherwise, in terms, provide the lien is to be regarded as maritime, and to be subject, as to its origin and incidents, to the same rules by which liens on foreign vessels are governed.

It is well known, that these State lien laws were passed after the decision in the case of *The General Smith*, which

declared that, the existence of liens in favor of material men in the home-port of a vessel depended on the local law. The case was generally regarded, however, (and, it would seem from the case of the *Lottawanna*, justly,) as deciding that by the general maritime law, as received in the United States, demands of that kind were not attended by any lien on the vessel. The statutes in question were passed to remedy this defect, and to give to domestic material men the same protection which the maritime law afforded to foreign material men. There is no reason to suppose that they were intended to do more, or that, it was sought to withdraw the demands of domestic material men from the operation of the general rules and principles by which maritime liens are governed.

Tested by those rules and principles, I think it clear, that the lien claimed in this case cannot be sustained. The authority of the master to bind the vessel, or her owner, results from his office. At the present day, he has in general ceased to be, as formerly, the *gerant*, or active partner, of a *societe en commandite*, and has become the stipendiary agent or *prepositus* of the owner.

As such he is, of course, bound to obey the instructions of the latter. But the law attaches to his office certain powers and rights within the limits of which his acts, though in violation of his instructions, will bind the vessel and her owner in favor of third persons, who deal with him in good faith, and in ignorance of his instructions, and unable, by reasonable diligence, to ascertain that he is exceeding his powers.

The limitations on the masters' authority to bind the ship for supplies and necessities have, in some instances, been enforced with great strictness, and the principle is firmly established, that "the supplies must appear to be reasonable, "or the money advanced for the purchase of them to have "been wanting, and there must have been nothing in the "case to repel the ordinary presumption, *that the master acted "under the owner's authority.*" (3 Kent's Comm., 212.)

"But, if it be made to appear that the credit to the ship

“ was unnecessary, either by reason of the master having
“ funds in his possession applicable to the expenses incurred,
“ or credit of his own, or of his owners, upon which funds
“ could be raised by the use of reasonable diligence; and
“ that the material man knew, or could, by proper inquiry,
“ have readily informed himself of the facts, the lien will
“ not be supported.” *The Grapeshot*, 9 Wall., 137; *The Lulu*, 10 Wall., 192.

Thus, when the master's authority to raise money on the credit of the vessel was by the written instructions of the owner limited to a pledge by way of bottomry, and he attempted to hypothecate the vessel in another form, it was held, that no lien was created in favor of a material man who knew that he was acting in violation of his instructions. *The barque Woodland*, 7 Bened., 110.

In this case, Mr. J. BENEDICT observes: “The master
“ has no power to bind the owner of the vessel, or the vessel
“ herself, beyond the authority given to him by the owner,
“ and the extent of such authority must be limited to the
“ express instructions of the owner, or to instructions to be
“ implied from the law of the country to which the vessel
“ belongs, and where the owner resides. Private instruc-
“ tions, unknown to the person who advances money for
“ necessities, cannot affect the rights of such person, when he
“ knows that the general maritime law of the country to which
“ the vessel belongs imports authority in the master to make
“ the contract relied on. But, even where such law, in the
“ absence of instructions, would import such authority, in-
“ structions which limit such authority will, if made known
“ to the party who contracts with the master, before the con-
“ tract is made, operate to prevent such party from claiming
“ against the owner of the vessel anything which does not
“ fall within the scope of such limited authority.”

Debts due for work and materials furnished to a vessel are regarded by the maritime law with great favor, and Valin and Emerigon both agree, that workmen employed by a master carpenter or caulker, who has contracted with the owner, have a lien on the vessel for the sums due them,

unless notice has been given to them in order that they may not be deceived. Emerigon Contr. a la Grope, 229; (See the *barque Harrison*, 1 Sawy. R., 372.)

A portion of the elaborate brief, filed by the learned advocate of the libellant, is devoted to showing, that a charterer to whom a vessel is hired in such a way as to make him owner for the voyage, or a master who is navigating the vessel, under an agreement to victual and man her, can bind her by their contracts for supplies and materials.

But this position is not disputed.

It may also be conceded, that the lien for supplies may be supported, although the furnisher knew that, by the terms of the charter, the charterer was to supply the coal for a steamer, or that the master, by his agreement, was to victual and man the vessel, let to him to be run on shares. *The City of New York*, 3 Blatch., 188; *The Monsoon*, 1 Sprague, 37.

But in both these cases the supplies were furnished to the vessel in a foreign port, and in the course of a voyage.

In the *City of New York*, Mr. J. NELSON thus states the reason of the rule: "Upon any other rule the master or agent of a vessel, in distress in a foreign port, would oftentimes find himself unable to procure the necessities essential to his relief. The voyage might be broken up for want of supplies, or the vessel might go to decay for want of proper repairs. I have found no case where it has been held that this knowledge on the part of the person furnishing the supplies, or making the repairs, under the circumstances stated, affects the right to charge the vessel as security for the payment."

In the case of *The Monsoon*, the head note prepared, it is presumed under the direction of the Judge, expressly limits the rule to cases of supplies furnished to a vessel "not in her home-port."

In these cases necessity calls into activity the extraordinary powers of the master, and the owner may reasonably be presumed to have contemplated and consented in advance to their exercise, and even to the violation of his own instructions, when indispensably necessary for the safety of

the vessel, or the prosecution of the voyage. But these considerations have evidently no application to a vessel in her home port, where her owner resides, and where the supplies have been furnished, not merely with full knowledge of the agreement between the owner and the master, but after express notice that if furnished it must be on the credit of the master exclusively. (See *The John Farron*, 14 Bened., 29.)

The material man, who, after such a notice, persists in furnishing supplies to the master, which are to be a charge upon the vessel, in effect aids the latter in violating his contract, disobeying his instructions, and committing a virtual fraud on his owner.

It would not, perhaps, be going too far to say, that under these circumstances the material man is estopped to assert that he colluded with the master to violate the rights of the owner; and that he must be conclusively presumed to have dealt with him on his personal credit exclusively.

It is urged that the statute confers the lien in absolute and unqualified terms, and that the owner cannot, by any act of his, withdraw his vessel from its operation.

But this is clearly a *petitio principii*.

The question is, does the statute confer the lien in all cases where the supplies are furnished at the request of the owner, master, or consignee, or agent of a vessel? or is not the question, whether the lien has been created to be determined by applying to it the rules and principles of the maritime law and the law on the subject of agency?

Unless this latter view be accepted the consequences would be anomalous and absurd.

Would it be contended, that where the owner himself attended to the supplying, repairs or equipment of the ship, the consignee could, without authority from him, bind the vessel for supplies furnished by a material man, fully apprised of the facts? Must not the "agent" spoken of in the statute be, an agent actually or apparently authorized by the owner to represent him?

And yet, the statute if it creates, in absolute terms, a lien for supplies furnished, at the request of the master, does

the like, when they are furnished at the request of the "consignee" or "agent."

Again, the statute creates the lien in general terms for "*supplies*," and for "services rendered on board" the vessel.

It will not, I think, be disputed that the *supplies* must be reasonable in quantity and kind, and apparently, at least, necessary and proper for the service in which the vessel is engaged.

The phrase, "services rendered on board" must be construed with a similar qualification. It would not include the services of musicians hired for the master's amusement, or those of a nurse or physician to attend his child, who might happen to be on board.

I mention these illustrations to show that the words of the statute cannot be taken in an absolute or literal sense, and that they must be read by the light of the established principles and rules which are applicable to the subject to which they refer.

For these reasons, I am of opinion that the lien conferred by the statute is essentially a maritime lien, that it is subject to the same rules and to be tested by the same principles as those which apply to liens for supplies furnished to a foreign vessel, and that it was not intended to confer upon a "master, agent or consignee" an irrevocable power to hypothecate the vessel for supplies in the port where the owner resides, contrary to his instructions, and in spite of his protest. And that the material man, who, with full notice of the circumstances, furnishing supplies to the master, must look to him personally, and not to the owner or the vessel for repayment.

It is suggested, that the establishment of a fixed, certain and inflexible rule, as to the rights of material men, would promote the interest of commerce. But those interests have not been found to require the adoption of such a rule in the case of supplies furnished in foreign ports.

In those cases, good faith and reasonable diligence are exacted of the material man, while the master is strictly confined within the limits of his actual or apparant authority.

I should, moreover, be inclined to fear that the practice of

letting vessels to persons of inconsiderable pecuniary responsibility to be run on shares, would fall into disuse if the owners were informed, that by no notice, agreement, or other act of theirs, they could prevent the vessel from being mortgaged for debts for which, by the agreement between them the master was to be exclusively responsible. A useful and meritorious class of men of energy and enterprise, but of small means, would thus be deprived of the opportunity of bettering their condition by sharing in the fruits of their own exertions, and be driven to accept a purely stipendiary employment.

With regard to the facts of this case, it is sufficient to say, that the proofs seem to me to substantially sustain the allegations of the answer.

Daniel T. Sullivan, Esq., Advocate for Appellant.

Milton Andros, Esq., Advocate for Claimant.

United States Circuit Court.

DISTRICT OF OREGON.

MONDAY, MAY 12, 1879.

IRA GOODNOUGH *et al.* vs. GEORGE WARREN *et al.*

1. **REMOVAL OF CAUSE.** A suit against tenants in common, or persons claiming to be such, concerning the title to, or possession of land, is divisible and removable into the National Court under § 639 of the R. S., by either of said tenants so far as he is concerned.
2. **IDEM.** The complainants brought suit in the State Court against W., a citizen of California, to quiet title to certain lands, and joined with him, as defendants, certain citizens of Oregon, from whom W. derived whatever right or title to the premises he has. *Held*, that the substantial controversy in the suit was wholly between citizens of different States—the complainants and W.—and might, therefore, under § 2, of the act of March 3, 1875, (18 Stat., 470,) be wholly removed by the latter into the National Court.
3. **DEED.** At common law, a deed is valid between the parties thereto and their privies, although not witnessed, acknowledged or recorded, and it is so in this State without acknowledgment or record. *Semble*, that

under the Oregon statute the attestation of a deed is no part of its execution, but only the appointed means of preserving the evidence thereof; and *Quere*, is acknowledgment equivalent to attestation; but that the deed of a married woman is not operative until acknowledged upon a privy examination, as provided by statute.

4. **RECORD OF DEED.** A record of a junior deed does not avoid an unrecorded elder deed to the same premises, when the junior deed was taken with knowledge of the existence of the elder one; the grantee in the junior deed, under such circumstances, is not considered a *bona fide* purchaser.
5. **AGENT—KNOWLEDGE OF.** The grantee in a conveyance obtained through the agency of a third person, is bound by the knowledge of such agent as to the existence of a prior unrecorded deed to the same premises.

Suit in equity to quiet title.

DEADY, J.

This suit was brought by Ira Goodnough, George Woodward and Thomas Connell, against five of the seven children of the late Jonathan Keeney and Marcena Moore, George Warran, A. J. and Levi Knott, in the State Circuit Court for Linn County, to quiet the title to the undivided west half of the donation claim of Jonathan Keeney and Mary, his wife, it being claim No. 42, and containing 320 acres, and also, the donation claim of Isaac McGinnis, it being claim 5577, and containing 160 acres; the said claims being adjoining one another, and situate in the county aforesaid.

It appears, from the complaint, that on August 13, 1867, said Keeney and wife, then residing in the territory of Idaho, sold the premises to Anthony, Amasa and Albert Moore, and executed a deed to them for the same, with a covenant to warrant and defend against all persons claiming under them, which deed was duly acknowledged by the wife, but not the husband, before the clerk of a Probate Court in said territory, and on July 9, 1868, was copied on the record of Deeds in Linn county, but was not entitled to record, because there was no certificate upon such deed as to the official character of the person taking such acknowledgment, and the genuineness of his signature, thereto, etc., as required by § 12 of the Oregon Act upon Conveyances, (Or. Laws, 516), in the case of deeds executed elsewhere in the United States

to lands within the State; that on February 4, 1873, said Anthony, Amasa and Albert, for a valuable consideration, conveyed said premises to A. J. Moore and Alexander Moore, which deed was duly recorded on the following day; that on October 21, 1874, said A. J. Moore conveyed his interest in the premises to said Alexander, and on September 30, 1876, said Alexander conveyed the premises to Marcena Moore; that on April 23, 1877, said Marcena and Alexander mortgaged the premises to D. Brenner, to secure the payment of a promissory note of the same date, made by said Anthony and Alexander Moore, for the sum of \$980.59, which mortgage was duly recorded on April 26, thereafter; that afterward, by means of sundry conveyances made in pursuance of a judgment obtained against said A. J. Moore by Charles Goodnough, on December 3, 1876, and a decree of March 13, 1878, foreclosing said mortgage and executions issued thereon, and sales upon the same, and other conveyances by the grantees in said last mentioned ones, the complainants became, and were, the owners of whatever interest, right or title in and to the premises passed to said Anthony, Amasa and Albert, by the deed to them of Keeney and wife of August 13, 1867; that after the execution of said last mentioned deed, and prior to November 21, 1878, said Jonathan Keeney died intestate, leaving the defendants, James Keeney, Peter L. Keeney, Nancy Glen, Betsy Keeney, Mary C. Hockensmith, Eli Keeney and Elias Keeney, as his children and heirs at law, and Mary Keeney, as his widow; that on November 21, 1878, said widow and said Betsy and Peter sold and quit-claimed their interest in the premises to said Marcena Moore—the former for the consideration of \$200 and the latter of \$100, and said Nancy on the following day did the same for the consideration of \$100; that on December 11, 1878, said Marcena, for the consideration of \$2,000, conveyed her interest in the premises to the defendant, George Warren, which deeds to said Marcena and said George were duly recorded on December 12, 1878; that said Marcena at the time of taking said conveyances from the children and widow of Jonathan Keeney, had actual

knowledge of the sale and conveyance aforesaid from Keeney and wife to said Anthony, Amasa and Albert Moore, and the said defendant Warren, at the time of taking the said conveyance from said Marcena, had such knowledge also; and that neither said Marcena Moore nor Warren took such conveyances in good faith, but with the intent to defraud the complainants.

The defendant Warren removed the cause to this Court, under the act of July 27, 1866, (§ 639 R. S.,) upon the ground that he was a citizen of California, and that the suit is one "in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the case."

The transcript of the pleadings, process and proceedings was filed in this Court on March 25, 1879. The complainants moved to remand the case upon a number of grounds, all of which were abandoned on the argument except the one,— "that the defendant had no right to remove the cause under any statute of the United States."

The District Judge, with the concurrence of the Circuit Judge, who was consulted, denied the motion, upon the ground that if the defendant Warren had any interest in the premises, he was simply a tenant in common with the complainants, and that therefore the controversy, so far as he was concerned, could be determined without the presence of the other defendants as parties, citing *Fields v. Lownsdale* (1 Dedy, 288; *Fields v. Lamb*, *Id.* 430; *McGinnity v. White*, 3 Dil. 350; and also, that under § 2 of the Act of March 3, 1875, (18 Stat 470,) the defendant Warren had a right to remove the whole cause into this Court, because this is a suit in which there is a *controversy* wholly between citizens of different States—the complainants and said Warren—a controversy as to the nature and effect of the deed from Keeney and wife to the three Moores, and the effect of the subsequent conveyances, under the circumstances, from the widow and three children of Keeney to Marcena Moore, and the latter to the defendant Warren, which can be fully determined as between them, citing *Donahoe vs. The Mariposa L. & M. Co.*, (1 PACIF. C. L.

J., 211,) and further, that this is a suit in which there is no *controversy*, except the one between the complainants and Warren, and that the other parties made defendants are neither necessary nor proper parties to the suit, because they have no interest in the subject matter, or the controversy concerning it.

The defendant Warren now demurs to the bill, and for cause of demurrer alleges, that there is a misjoinder of parties defendant, and that the bill is without equity. Warren being the only defendant in this Court, the first cause of demurrer was abandoned on the argument. Under the second one it was maintained that the purchaser, at the foreclosure sale, took nothing but the interest that was vested in the mortgagors at the date of the mortgage, citing *Goodnough vs. Ewer*, (16 Cal., 469; *Boggs vs. Hargrave, Id.*, 562; *Jackson vs. Littell*, 56 N. Y., 111; and *Ostenberg vs. Union Trust Co.*, 93 U. S., 428,) which point was admitted by counsel for complainant; and also, that the instrument signed by Keeney and wife was not their deed, and therefore did not pass the legal estate in the premises; and that if it was such deed, it was so far avoided by the conveyances from the widow and children of Keeney, which were first duly recorded.

Excepting in the case of a married woman, a deed, at common law, is valid between the parties thereto and their privies; although not witnessed, acknowledged or recorded. It is only necessary that the writing should be signed, sealed and delivered, to make it the deed of the party. (2 Black, 307; 4 Kent, 450, 456; 2 Wash., R. P. 572; *Dole vs. Thurlow*, 12 Met., 164; *Hepburn vs. Dubois et al*, 12 Pet., 375; *Elliott vs. Piersol*, 1 Pet., 366; *Moore vs. Thmas*, 1 Or., 211; *Musgrove vs. Bonser*, 5 Or., 314.)

Does the statute of Oregon change this rule? Section 1 of the act relating to conveyances (Or. Laws, p. 515) declares, that "conveyances of lands, or of any estate or interest therein, may be made by deed *signed and sealed*," and although in the same section and sentence, it is further provided, that such deeds may be "acknowledged, or proved and recorded," as therein directed; yet, it is not declared,

and evidently was not intended, to make either such acknowledgment, proof or record, any part of the execution of such instrument. These acts are all *subsequent* to the execution of the deed, and are the appointed means by which constructive notice of its execution and contents may be given to all the world. But section 10 of the act aforesaid does declare, that, "Deeds, executed within this State, of lands, or any interest of lands therein, *shall be executed in the presence of two witnesses who shall subscribe their names to the same as such.*" and while this provision may not make such attestation an essential part of the execution of the deed, yet, it is probable, that where the execution is *controverted*, it cannot be shown, if not so attested. It is not a part of the execution, but the means by which it must be proven, if necessary. (2 Black., 307.) And it may be also, that, as an acknowledgment before a proper officer of the execution of a deed has the same effect as proof of the same by the attesting witness, to authorize the deed to be admitted to record, that it should have the same effect as an attestation generally. A formal acknowledgment, before a proper officer, by a grantor in a deed, that he executed it, is as safe and satisfactory evidence of the fact as the testimony of any subscribing witnesses.

Nor does it appear, that under the statute the deed of a married woman is fully executed, or effectual to pass an interest in land, until it is duly acknowledged. (*Elwood vs. Black*, 13 Barb., 50.) At common, law the deed of a *femme covert* was void, and she could only convey her lands by levying a fine, as it was called—a proceeding which involved a privy examination of the wife, as in the case of an acknowledgment. (2 Black., 348; 4 Kent, 497; 2 Wash., R. P., 559.)

These questions—is attestation necessary under the statute to the validity of a deed between the parties? and is acknowledgment a necessary part of the execution of the deed of a married woman?—do not appear to have been passed upon by the Supreme Court of the State, and therefore, they should not be here, if it can be avoided.

The deed of Keeney and wife was not executed within this State, but in Idaho; and while it is not shown what is the law of that territory upon the subject of conveyances, until the contrary appears, it will be presumed to be the same as that of Oregon. The deed is attested by three witnesses—one of them being Anthony Moore himself—and is duly acknowledged by the wife. The fact that the official character of the officer taking the acknowledgment, and the genuineness of his signature, is not certified to by a clerk of a Court of record, or other proper certifying officers, does not, in my judgment, affect the validity of the acknowledgment, although such certificate was necessary to authorize the deed to be admitted of record.

The case then stands thus: Keeney and wife by their deed duly executed, on August 13, 1867, conveyed the premises—including, as I suppose, one half of the wife's share of the donation—to the three Moores, and the complainants, before November, 1878, succeeded to their interests in the same; while in November, 1878, the widow and three of the seven children of said Keeney executed conveyances of the premises to Marcena Moore, the grantor of the defendant. The deed from Keeney and wife, not being acknowledged by Keeney, nor the acknowledgment of the wife certified to, as required by section 12 of the Act on Conveyances, was not entitled to record; and although actually copied upon the record on July 9, 1868, is to be taken and considered as an unrecorded deed. While this deed was unrecorded, the deeds to Marcena Moore and the defendant Warren were duly executed and recorded.

Apart from the effect of the non-registration of the Keeney deed, and the registration of the deeds to said Marcena and the defendant, the complainants have the legal title to the premises, and the defendant has no interest in them.

But by section 20 of the Act on Conveyances, (Or. Laws, p. 518,) it is provided that a conveyance which is not recorded within five days from the making of it "shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real property * * * * whose conveyance shall be first duly recorded."

The object of this provision is plain. It is to protect innocent purchasers from the operation of secret or unknown prior conveyances. To do this, in case of conflicting conveyances, it declares the deed of the party in default, by not recording the same, to be void; but only so in favor of a *bona fide* purchaser for valuable consideration. The statute works a forfeiture of a prior estate, and is not to have effect except within the reason of it.

From the time of *Jackson vs. Burgott*, (10 John, 459,) decided by Ch. J. KENT, in 1813, it has been held that notice of a prior deed takes the case out of the statute, and supercedes the prior registry, because a person, purchasing with knowledge of such conveyance, cannot be considered as acting in good faith. In this case, the Court, speaking of a purchase with notice of a prior unrecorded deed, say: "It may be assumed as a settled principle in the English law," that "the prior deed shall have the preference. * * * It is considered as done *mala fide* by assisting the original vendor to defraud the prior vendee, and the Courts will not suffer a statute, made to prevent fraud, to be a protection to fraud."

The same ruling has been made by the Supreme Court of the State in *Bolhman vs. Coffin*, (4 Or., 317, and *Mosgrove vs. Bonser*. (5 Id., 316.)

What amounts to notice of a prior deed is a question that must be determined largely by the circumstances of each case. But it cannot be denied that, in some instances, the question has been decided in favor of the prior deed, under circumstances well calculated to seriously impair, if not destroy, the efficacy of this wholesome provision in favor of prompt and proper registration of deeds.

But in this case, according to the allegations of the bill, and I think, the strong probability of the case also, Marcena Moore, at the time of taking the conveyances to herself, had *actual knowledge* of this unrecorded deed, and the defendant, at the time of the conveyance to him had such knowledge also—if not personally, then by his agent, Anthony Moore, who acted for him in making the purchase and obtaining the

conveyance. Whatever knowledge the agent had, or acquired, in this case of the prior deed, before completing the purchase for Warren, the law imputes to the latter, and he is chargeable with it, whether actually communicated to him or not. (Story's Eq., § 408; *Bowman vs. Nathan*, 2 McLean, 400; *Barnum vs. Milford*, 4 McLean, 94; *Bank of U. S. vs. Davis*, 2 Hill, 46; *Hough vs. Richardson*, 3 Story, 697; *Bierce vs. Red Bluff Hotel Co.*, 31 Cal., 160; *May vs. LeClare*, 11 Wall., 233; *The Distilled Spirits, Id.*, 356.)

The demurrer is overruled.

E. C. Bronaugh for the Complainants.

W. S. Beebe, H. T. Bingham for the Defendant.

Supreme Court of Oregon.

MAY, 1879.

THE STATE OF OREGON, RESPONDENT,

VS.

JACKSON GRANT, APPELLANT.

Appeal from Multnomah County.

Opinion by PRIM, J.

This appeal is based upon exceptions taken at the trial to the charge of the Court. All the material parts of the charge appear to be set out in full in the bill of exceptions, and having examined it carefully, we find no serious objections to any portion thereof, except the last instruction, which is in these words: "There is no evidence in this case which reduces the crime from murder in the first degree to murder in the second degree, or to manslaughter. The defendant, if he is guilty at all, is guilty of murder in the first degree."

This instruction, we think, is erroneous, and should not have been given. The appellant is charged in the indictment with murder in the first degree, and under the indictment, might have been convicted of murder in the first degree,

murder in the second degree, or manslaughter. Section 160 of the Criminal Code provides that, "where it appears that the defendant has committed a crime, and there is reasonable ground of doubt, in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only." It was the province of the jury to determine the *degree* of the guilt, as well as the *guilt* itself of the appellant, and this instruction withdrew that question from their consideration. While the Court may state to the jury what the evidence tends to prove, it is their peculiar province to determine upon the weight and effect of the evidence. (Hilliard on new trials, 226, Sec. 41.)

The facts reported in the bill of exceptions are very meager—they are, that the deceased was found dead in a ravine, near his cabin, with one large hole and twenty-two small ones in his back—that they were gunshot wounds, and were the cause of his death. These facts are insufficient to raise a conclusive presumption of murder in the first degree.

To constitute murder in the first degree, it is not enough to show that the deceased was killed by some one; but it must be shown that he was killed *purposely*, and of deliberate and premeditated malice. In this case the malice might be inferred from the use of a deadly weapon, if there was anything to show that it was done *purposely* and with deliberation.

For aught that it appears, the deceased may have been killed by some one purely accidentally, and without any purpose whatever to injure him, or anyone else, in which case it would have been murder in either degree. Or it may have been done by some while engaged in the shooting of wild game, but without "*due caution and circumspection*," in which case it might have been involuntary manslaughter. In this case, we think the Court erred, in not leaving the degree of guilt to the determination of the jury, as well as the guilt itself.

The judgment of the Court below is reversed, and the cause remanded for a new trial.

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No. 14.

Current Topics.

WE call attention to the decision by the U. S. Supreme Court in this issue in the case of *Flagstaff Silver Mining Company vs. Tarbet*, respecting locations of mining claims.

WE publish this week several decisions of our Supreme Court. This completes all the opinions rendered by the Court during this present term. The Court will adjourn next week.

IN this issue we publish the case of *People vs. Yoakum*. The sequel which is now generally known gives no commendable notoriety to the citizens of the community where such defiant outlawry was committed. A disposition has been shown by the press generally to charge those bad consequences to some neglect of duty on the part of the Courts of the county. We, however, have seen no criminal delay in this matter, nor such neglect as would produce such a result.

THE Supreme Court of the United States has adjourned for the term. We have made it one of the special features of the JOURNAL to publish the important decisions of that Court applicable to the Coast States. The eagerness with which our publication is now sought, with a view to obtain those decisions, show that we have made no mistake in introducing such a feature. We are greatly indebted to Mr. Justice FIELD, of that Bench, who has selected for us, with great care, and his well known ability, all the opinions of that Court which would be of value to the bar of this coast.

Supreme Court of California.

MAY TERM, 1879.

[No. 10,394.]

[Filed May 24, 1879.]

EX PARTE NEWTON.

The act of March 30, 1872, to increase and facilitate the collection of licenses in San Francisco, was not repealed or abrogated by the Codes.

The provision of Sec. 3,363 of the Political Code, to the effect that all moneys collected for licenses under the provisions of that chapter, shall be paid into the general fund of the county, is applicable to the city and county of San Francisco.

The act of March 27, 1878, to facilitate and equalize the collection of licenses in the city and county of San Francisco, regulates the rates of license to be collected by the city and county, and is a valid exercise of powers by the legislature.

S. Heydenfeldt, Jr., for Petitioner.

PER CURIAM.

The act of March 30, 1872, to increase and facilitate the collection of licenses in San Francisco, (Stats. 1871-2, p. 736,) was not abrogated or repealed by the Codes. The act, though passed at the same session as the Codes, was retained in full force and effect by the provisions of Sections 4,478 and 4,479 of the Political Code. The act provided, among other things, that all licenses, whether provided for by law, or by the orders of the Board of Supervisors of the city and county, should be collected by the Collector of Licenses and his deputies; and also, that persons transacting any business, etc., required by law to be licensed, without having procured a license therefor, should be deemed guilty of a misdemeanor, and on conviction thereof, should be punished as provided in the act.

We are also of the opinion that the provision of Section 3,363, of the Political Code, to the effect that all moneys collected for licenses under the provisions of the chapter containing that section, shall be paid into the general fund of the county, is applicable to the city and county of San

Francisco. The provisions of subdivisions 1, 2 and 25 of Section 19, Political Code, continuing in force acts incorporating, or chartering, municipal corporations, and consolidating cities and counties, and in relation to taxation for local purposes, do not prevent the above mentioned provision of Section 3,363 from taking effect in the city and county of San Francisco. The provision for the payment of those funds into the Treasury of the city and county does not impair or interfere with the operation of the acts mentioned in those subdivisions of Section 19.

The act of March 27, 1878 (p. 424,) to facilitate and equalize the collection of licenses in the city and county of San Francisco, is regarded by one of the counsel for the petitioner as applicable to licenses for State purposes alone; while the other counsel for the petitioner and the counsel for the People consider it as regulating and equalizing only licenses for city and county purposes. The first section provides that "every person, firm or corporation engaged in carrying on, pursuing or transacting, within the limits of the city and county of San Francisco, any business, trade, profession, occupation or employment hereinafter specified, shall pay licenses as therein provided." The act then provides for brokers, bankers, merchandise, retail liquor dealers, auctioneers, livery stable and theatre licenses; and classifies the same, and fixes the rate to be paid by each class. There is no provision in the act, similar to those usually contained in acts providing for licenses for State purposes, by which power is granted to the municipal authorities to levy or collect licenses for municipal purposes, or recognizing the existence of such power; nor does the act provide for the disposition of the funds collected under its provisions. The act, when considered in connection with the provisions of the Political Code above mentioned, must be regarded as regulating and equalizing licenses for city and county purposes only.

No valid objection is urged to the exercise of such power by the Legislature. The municipality possesses only such power in regulating or collecting licenses as may be granted

by the Legislature. It may be granted or withheld, and if granted, it may be subject to such conditions or limitations, as the Legislature may prescribe. It cannot be doubted that the maximum rates may be fixed by law; and if the Legislature possesses that power, it would seem equally clear that the precise rates may be determined in the same manner. A municipality has no inherent power, by virtue of its existence as a municipality, to impose a license upon business, but its power in this respect comes from the Legislature, and must be found in the organic act, or necessarily inferred from the powers therein expressly granted.

The act of March 27, 1878, repealed by implication or abrogated all existing provisions, whether of law, or of the orders, or ordinances of the city and county, fixing the rates of license to be paid by those conducting the several kinds of business enumerated in the act, and the rates of license therein fixed, became the rates thereafter to be collected by the city and county. The act, in our opinion, is not in contravention of any provision of the Constitution.

- Prisoner remanded.

[No. 10,415.]

[Filed May 24, 1879.]

PEOPLE vs. WILLIAM J. YOAKUM.

1. The requisites of affidavits in support of an application to change the place of trial of a criminal action on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending, pointed out.
2. Though the statute (*Penal Code*, Section 1035,) requires that the Court must be "satisfied" of the truth of the representation of the prisoner, the granting or refusing of the application is not a matter of mere discretion; the decision must find warrant in the facts disclosed by the record.
3. An order refusing to change the place of trial reversed undpr the circumstances appearing in this case, no counter affidavits having been filed.

A. Campbell, D. S. Terry, P. T. Colby, V. A. Gregg and E. C. Calhoun, for Appellant.

Attorney General, for the People.

WALLACE, C. J., delivered the opinion of the Court.

The prisoner having been found guilty of the crime of murder in the first degree in the felonious killing of one Johnson, brings this appeal from the judgment of death rendered against him thereon, and from an order denying his motion for a new trial. Upon the argument of the case, several alleged errors were relied upon, but the conclusion to which we have arrived upon one of these will render unnecessary the consideration of the others.

The prisoner, before the trial, made an application, in conformity to the provisions of the Penal Code, for the removal of the case from the county of Kern, where it was pending and subsequently tried, on the ground that a fair and impartial trial could not be had in the said county of Kern. The application was denied, and the prisoner excepted.

The statute, (*Penal Code*, Sec. 1095,) provides, that if the Court be "satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper Court of a county free from like objection." An application of this character is addressed, as we have said here, in other cases, somewhat to the discretion of the Court; its allowance or refusal was characterized in *People vs. Congleton*, as "largely discretionary." (44 Cal., 95.) The Court must be *satisfied*, is the language of the statute. The discretion of the Court. invoked by the application, is not, however, a mere arbitrary discretion, but a discretion, the exercise of which, must be reasonable. The conclusions reached on the application must be such as find warrant in the facts disclosed by the affidavits filed, and in the circumstances made to appear in the record. In the cases in which the refusal of the trial Court to order a change of the place of trial has been sustained here, the affidavits filed in support of the application, were in themselves indefinite, and, therefore, unsatisfactory; they stated no facts or circumstances from which the Court might justly infer that a fair

trial could not be had. In some instances *the mere opinion* of the affiants that an impartial trial could not be had was set forth; in others, the facts stated did not support an inference that any such prejudice existed in the popular minds as would interfere with the impartial administration of the law. Thus, in *People vs. Congleton*, (*supra*,) we said: "In this case, the affidavits upon which the motion was based, were exceedingly unsatisfactory; they in the main set forth merely that in the *opinion or belief of the affiants* the prisoner could not have a fair trial, owing to the popular prejudice against him." So in *People vs. Thuler*: "The defendant's affidavit does not establish the fact, that the people of the county of Butte were so prejudiced against him as to become disqualified to sit as jurors in this case. The statement in this respect was upon his information and belief, which, standing alone, no Court in the exercise of a proper discretion could regard of sufficient probative force to authorize a change of the place of trial." (28 Cal., 495.) So in *People vs. Mahoney*: "The mere affidavit of the defendant does not render it obligatory on the Court to change the venue." The statute declares: "If the Court be satisfied that the representation of the defendant be true, an order shall be made for the removal." It is evident, therefore, that the Court is not bound to take for granted the unsupported statement of the defendant, and assign it conclusive effect. A reasonable discretion is to be given to it on this subject, and while we should not be disposed to hold an arbitrary refusal to change the venue as warranted, yet we think the mere unsupported assertion of the defendant, that he was the victim of a general prejudice in the county, is not a conclusive reason for changing the venue, when it is so easy to obtain corroboration of the statement, if it were really true. (18 *Id.*, 186.)

In *People vs. Graham*, the application was based upon the fact, that some thirty or forty persons in the county of Sonoma had, by subscriptions among themselves, raised a sum of money to procure a lawyer to assist the District Attorney in the prosecution, and no other fact was set forth as

tending to show the existence of any prejudice against the prisoner among the citizens of that county. The Court said, that such a fact, in itself, "does not show the existence of such an excitement or prejudice in the whole county upon the subject as would preclude the possibility of procuring an impartial jury without difficulty, or would, in any manner, interfere with the impartial administration of the laws."

In none of these cases did the affidavits meet the requirements of the statute. The correct rule of practice to be observed in an application of this character, and the requisites of the affidavits to be used in its support, are well set forth in *People vs. McCauley*. "Affidavits," said Mr. Justice BENNETT, in this case, "for such a motion must state the facts and circumstances from which the conclusion is deduced, that a fair and impartial trial cannot be had. The conclusion is to be drawn by the Court, and not by the defendant and his witnesses, and the Court must be satisfied, from the facts and circumstances positively sworn to in the affidavits, and not from the general conclusions to which the defendant may swear, or which his witness may depose they verily believe to be true." (1 *Id.*, 383.)

The circumstances surrounding the case at bar are such as would naturally superinduce intense excitement among the people where it occurred. It would, indeed, have been strange if such an outrage had not deeply moved the public mind. The killing was undoubtedly an assassination, and, in fact, the single ultimate question involved at the trial was one of mere identity of the prisoner as being the assassin. The murder was committed by gunshots, fired under cover, in the open day, from the side of the public road, upon which the murdered men were traveling, in company with the wife, children and sister of one of them. The wife undertook to identify the accused and his brother as being the murderers, and swore, at the Coroner's inquest, that she saw them immediately after the killing, with guns in their hands, running away from the road-side where, according to her testimony, they had been lying concealed behind a point of

rocks. The belief that the prisoners were guilty seems to have become general and widespread in the county. The most respectable and influential citizens believed it. The Sheriff of the county and his deputies, or some of them, seem to have been decidedly of that opinion, and the Court below set aside the panel of one hundred jurors, summoned by those officers, because of their disqualification in that respect, though, singularly enough, some seventy-five of the same panel were immediately resummoned by an elisor or elisors subsequently appointed by the Court, and several of the resummoned panel actually sat as trial jurors in the case, against the objection of the prisoner.

The affidavits filed in support of the application were some twenty-two in number, and they detail with much particularity the occurrences in the county following the perpetration of the murder, and indicating great and wide-spread excitement among the people of that county. The affiants appear to be persons of great respectability and intelligence, some of them old residents of the county, and intimately acquainted with its inhabitants, some of them persons holding official positions, and all of them following business pursuits bringing them in contact with the people, and affording them opportunities to be informed of the state of the public mind throughout the county of Kern, with reference to the charge pending against the prisoners. Threats appear to have been openly made in Bakersfield, by persons assembled from various parts of the county of Kern, to tear down the jail and hang the defendants; and they seem to have desisted only because they were persuaded that the jail was strongly guarded, and that some of them would probably lose their lives if they should make the attempt. It is stated in these affidavits, that there exists throughout the county a general feeling of extreme hostility against the prisoner, and a general belief that he is guilty of the murder charged in the indictment. Nor is the truth of these statements denied by the prosecution. No counter affidavit was offered by the State; so far as the record shows, it was not even pretended below, upon the part of the people, that the statements con-

tained in the moving affidavits were untrue or mistaken in any respect.

In the condition of the public mind in Kern county, as established by the affidavits on file, the prisoner could not have a fair trial of the case. So bitter indeed was the public feeling against the prisoner, that its manifestation could not be wholly repressed, even in the presence of the Court, when the trial was about to commence. The ruling of the Court, when adverse to the prisoner, was openly applauded by persons assembled in the Court room. Before the motion to change the place of trial came on to be heard, the prisoner had interposed a challenge to the panel returned by the elisors appointed by the Court. In order to support the challenge, one of the elisors had been placed under examination as to the circumstances under which he had acted and the manner in which he executed the venire placed in his hands. Whenever the witness, in the course of his examination, gave an answer favorable to the prosecution, there was applause in the Court room. "When the motion was passed by the Court, and *denied*, there was applause from the seats where the jurors sat." That this unseemly manifestation of popular passion actually occurred in the presence of the Court, when the trial of the prisoner was about to commence, is not denied; its significance, as to whether a dispassionate trial of the prisoner could be hoped for in Kern county, ought not to have been misunderstood.

The prisoner, whether guilty or not, is unquestionably entitled by the law of the land to have a fair and impartial trial. Unless this result be attained, one of the most important purposes for which government is organized, and courts of justice established, will have definitely failed. Cases sometimes occur, and this would appear to be one of them, in which the very enormity of the offense itself arouses the honest indignation of the community to such a degree as to make it apparent that a dispassionate investigation of the case cannot be had. Under such circumstances, the law requires that the place of trial be changed.

Judgment reversed and cause remanded, with directions

to enter an order removing the cause from the county of Kern:

Remittitur forthwith.

We concur:

CROCKETT, J.

RHODES, J.

NILES, J.

McKINSTRY, J.

[No. 10,399.]

[Filed May 19, 1879.]

PEOPLE vs. HERSEY.

In a criminal case, if the jury, after having retired to consider of their verdict, return into Court, and request to be further instructed as to the law of the case, it is error *per se* for the Court, in the absence of the phonographic reporter, to instruct them orally without the consent of the respective counsel.

W. C. Belcher and A. L. Hart, for Appellant.

Attorney General, for the People.

CROCKETT, J., delivered the opinion of the Court.

After the jury had retired to deliberate on their verdict, they returned into Court and propounded to the Judge certain questions as to the law of the case, which were answered orally by the Judge, in the absence of the phonographic reporter, and without the consent of the defendant. At the close of the oral charge, one of the jurors inquired of the Judge, whether they were "to go by the written instructions?" to which the Judge orally replied, "Yes, sir; you are to go by the written instructions as to the law of this case, and by nothing else." After the jury had again retired, and the phonographic reporter had returned into Court, the Judge stated to the reporter his recollection of what had occurred, and it was then reduced to writing by the reporter. This action of the Court was excepted to by the defendant, and is relied upon as error.

Section 1093 of the Penal Code, as amended in 1874, and in force at the time of the trial, provides, in subdivision 6,

that "if the charge be not given in writing, it must be taken down by the phonographic reporter." There can be no doubt, that this provision was intended to be mandatory, and not merely directory.

From an early period in the legislation of this State, it was the uniform policy to require the charge to the jury in a criminal case to be in writing; and section 362 of the Criminal Practice Act, as amended in 1855, provided that "such charge shall be reduced to writing before it is given; and in no case shall any charge or instruction be given to the jury otherwise than in writing, unless by the mutual consent of the parties." In constructing this statute, it has been repeatedly held to be error *per se* to charge the jury orally, except with the consent of the parties. (*People vs. Beden*, 6, Cal., 246; *People vs. Payne*, 8 id., 341; *People vs. Demint*, 8 id., 423; *People vs. Ah Fong*, 12 id., 345; *People vs. Shaw*, 26 id., 76; *People vs. Sanford*, 43 id., 29; *People vs. Prospero*, 44 id., 186.)

Section 1093 of the Penal Code, as amended in 1874, is not substantially different from the statute under which these decisions were made. It explicitly provides that if the charge be not given in writing, it must be taken down by the phonographic reporter, the only change being, that the charge need not be in writing, provided it is taken down at the time by the phonographic reporter. In either event, the charge is thus reduced to writing, either by the Judge, or by the reporter, when it is given, and there can thereafter be no uncertainty as to what the charge was. But if the Court could charge the jury orally in the absence of the phonographic reporter, and could thereafter require him to take down the charge, according to the recollection of the Judge as to its contents, it would introduce into the proceeding the very element of uncertainty which it was the purpose of the statute to prevent. Nor can the practice pursued in this case be supported under section 1138 of the Penal Code, as amended in 1874, which provides, in substance, that after the jury has retired for deliberation, if they desire to be informed on any point of law arising in the case, "the infor-

mation required, must be given in the presence of, or after notice to the District Attorney and the defendant or his counsel, or after they have been called." This was not intended to authorize an oral charge, which, at that stage of the proceeding, might often be productive of more pernicious results than if the original charge was oral. When the jury asks to be further instructed as to the law of the case, it is usually upon points which they deem to be, if not decisive, at least entitled to serious consideration; and if the parties are called, and do not appear, the Court may proceed to instruct the jury in their absence, in which event, if the charge be oral, they would have no opportunity of ascertaining its contents, except from the recollection of the Judge. This would introduce into the proceeding the element of uncertainty, which it is the especial purpose of the statute to prevent, and that, too, at the most critical period of the trial.

Nor did the statement of the Judge to the jury, at the close of his oral charge, that they were to be governed by the written instructions and nothing else, cure the error which was committed. It was error *per se* to instruct them orally; and we cannot say, that it did not prejudice the defendant.

Judgment and order reversed, and cause remanded for a new trial.

Remittitur forthwith.

We concur:

McKINSTRY, J.

RHODES, J.

NILES, J.

Supreme Court of the United States.

OCTOBER TERM, 1878.

(No. 998.)

THE FLAGSTAFF SILVER MINING COMPANY OF
UTAH, (LIMITED), PLAINTIFF IN ERROR,

VS.

HELEN TARBET.

A location of a mining claim upon a lode or vein of ore, should be laid along the same lengthwise of the course of its apex at or near the surface, as well under the Mining Act of 1866, as under that of 1872. If located otherwise, the location will only secure so much of the lode or vein as it actually covers.

Each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him outside of the side lines of the location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface; and it is bounded at each end by the end lines of the location, crossing the lode or vein, and extended perpendicularly downward, and indefinitely in their own direction.

If a location be laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof, for the purpose of defining the rights of the owners.

A locator working subterraneously into the dip of the vein belonging to another locator, who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom.

In error to the Supreme Court of the Territory of Utah.

Mr. Justice BRADLEY delivered the opinion of the Court.

This is a writ of error to the Supreme Court of the Territory of Utah. The action was in the nature of trespass *quare clausum fregit*, brought in the District Court of the Territory for the Third District by Alexander Tarbet, and continued by his assignee, Helen Tarbet, the defendant in error, against the plaintiff in error and other persons. The action being dismissed as to the other persons, judgment was rendered upon the verdict of a jury against the plaintiff in

error for \$45,000 damages. The company carried the case to the Supreme Court of the Territory, where the judgment was affirmed, on the 3d day of June, 1878. The controversy relates to the working of a mine in Little Cottonwood Mining District, in the county of Salt Lake, Territory of Utah. The defendant in error claims to own, and to have been in possession of, a mining location on a lode called the Titus lode, the location including three claims, and extending 600 feet westwardly from the discovery, with a width of 200 feet, and including ten feet on the east side of the discovery, belonging to the South Star mine. The plaintiffs in error owned, and had a patent for another mining location, called the Flagstaff mine, 100 feet in width and 2,600 feet in length, running in a northerly and southerly direction, and crossing the Titus claims near the west end thereof, and nearly at right angles therewith. In working from the Flagstaff mine, the plaintiffs in error worked around subterraneously, to a point some 300 feet to the east of their location, and on the north side of the Titus mine, and within about 100 feet of the Titus location. It is for this working that the suit was brought; and the principal question is, whether the plaintiffs in error had a right thus to work outside of their location on the east, and whether, in doing so, they interfered with the rights of the defendant in error.

It is conceded that both parties are working on the same lode or vein of ore. The Flagstaff discovery, to which the location of the plaintiffs in error relates as its starting point, is situated nearly due west from that of the South Star and Titus, and about 550 feet therefrom. The lode crops out at the two points of discovery, but is not visible at intermediate points. These croppings, however, show that the direction or course of the apex of the vein, at or near the surface, is nearly east and west. The location of the Titus, claimed by the defendant in error, nearly corresponds with this surface course of the vein. The location of the Flagstaff, belonging to plaintiffs in error, crosses it nearly at right angles.

The principal difficulty in the case arises from the fact that the surface is not level, but rises up a mountain in going

from the Titus discovery to the Flagstaff. The dip of the vein being northeasterly, it happens that by following a level beneath the surface, the strike of the vein runs in a north-westerly direction, or about north 50° west. In other words, if by a process of abrasion, the mountain could be ground down to a plain, the strike of the vein would be north-west instead of west, as it now is on the surface; or, at least, as the evidence tended to show. that it is. In that case, the location of the defendant in error would leave the vein to its right, and the location of the plaintiffs in error would not reach it until several hundred feet to the north of the Flagstaff discovery.

Evidence being given *pro* and *con* in reference to the condition and situation of the vein, both at and below the surface, and to the workings thereon by both parties, the Judge charged the jury as follows:

“ If you find that Alexander Tarbet, during the time mentioned in the complaint, to wit: from January 1, 1873, to December 14, 1875, (being a period of 2 years, 11 months and 14 days,) was in possession of the whole, or an undivided interest, of Nos. 1, 2 and 3 of the Titus mining claim, and ten feet off No. 1 of the South Star mining claim, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface; then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also, of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways: by the length of the course of the vein within the surface; and, by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip;

and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again—

"The defendant (plaintiff in error) has not shown any title, or color of title, to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title, or color of title, to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

The Court refused to give the following instructions propounded by the plaintiffs in error, to wit:

"By the act of Congress of July 26th, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that act takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Secondly—

"In the very nature of the thing, a lode or vein in its unworked and undeveloped stage, cannot be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram required to be filed by the applicant for a patent under the act of 1866, was a diagram of the surface area claimed, and this diagram might be extended laterally and otherwise, as convenience in working this claim might suggest to the applicant."

These instructions and refusals to instruct indicate the general position taken by the Court below, namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near

the surface, no matter how far the location may extend in another direction.

The plaintiffs in error have made the following assignment of error, which indicates the position which they contend for:

"The plaintiff in error assigns for error the charge of the Court and the refusal to give its requests, that is, that the judge instructed the jury that the defendant below had shown no title, or color of title, to any part of the vein except so much of its length on its course as lies within the surface ground patented; and that he refused to direct the jury that by the act of Congress, it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode, irrespective of the surface area, which was merely for the convenience of working the lode; that the diagram required to be filed by an applicant for a patent, was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest; that the surface ground patented does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take; and, lastly, that the Flagstaff Company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location."

Both parties agree in the general rule, that the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downward; but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the general rule of miner's law, and the true construction of the act of Congress. The language of the act of 1866 (14 Stat.; 251) in relation to "a vein or lode" is, "that no location hereafter made shall exceed two hundred feet in length *along the vein* for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein *to any depth, with all its dips, variations and angles*, together with a reasonable quantity of

surface for the convenient working of the same as fixed by the local rules," etc. The act of 1872 is more explicit in its terms, but the intent is undoubtedly the same as it respects end lines and side lines, and the right to follow the dip outside of the latter. We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downward, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his right must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This, we consider, to be the law as to locations on lodes or veins.

The location of the plaintiffs in error is thus laid across the Titus lode, that is to say, across the course of its apex, at or near the surface; and the side lines of their location are really the end lines of their claim, considering the direction or course of the lode at the surface.

As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called—which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular

lines on every side, but gave him greater or less width, according to the dip of the vein. (See Rockwell, pp. 56-58; and see same book, pp. 274, 275.) But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although, laterally, its inclination shall carry it ever so far from a perpendicular. This rule, the Court below strove to carry out, and all its rulings seem to have been in accordance with it.

The plaintiff in error contended, and requested the Court to charge, in effect, that having received a patent for 2,600 feet in length and 100 feet in breadth, commencing at the flagstaff discovery, on the lode at the surface, they were entitled to 6,200 feet of that lode, along its length, although it diverged from the location of their claim, and went off in another direction. We cannot think that this is the intent of the law. It would lead to inextricable confusion. Other locations correctly laid upon the lode, and coming up to that of the plaintiff in error on either side would, by such a rule, be subverted and swept away. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein farther than it continued substantially to correspond with it. Of what use would a location be, for any purpose of defining the rights of parties, if it could thus be made to cover a lode or vein which runs entirely away from it? Though it should happen that the locator, by sinking shafts to a considerable depth, might strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow the dip in a regular way. So far as he can work upon it, and not interfere with their right, he might probably do so, but no farther. And this consequence would follow, irrespective of the priority of the locations. It would depend on the question, as to what part of

the vein the respective locations properly cover and appropriate.

We do not mean to say, that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein, and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of Congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is, to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.

If these views are correct, the Titus claims, belonging to the defendant in error, were located along the vein or lode in question, in a proper manner, and the Flagstaff claims, belonging to the plaintiffs in error, were located across it, and can only give the latter a right to so much of the vein or lode as is included between their side lines. The Court below took substantially this view of the subject, and ruled accordingly.

As this is really the whole controversy in the case, it is unnecessary to examine more minutely the different points of the charge, or the instructions asked for by the plaintiffs in error. The question was presented in different forms, but all to the same general purport.

The judgment of the Court below is affirmed.

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Current Topics.

THE importance and value of the interesting opinion of Judge SAWYER in the case of *LeRoy vs. Burton*, entitles it to the great space allotted to it in this issue.

IN the matter of the *Boca* claim, the Commissioner of the General Land Office, in refusing the application of Gilpin for a patent, says: "Where a grant of vacant non-mineral land was made, which was to be surveyed and located by the Surveyor General, and that officer regularly discharged that duty, and reported that the land located was not mineral in character, the title thereby vested can not be disturbed upon subsequent allegations that the lands contain minerals."

Recent Decisions.

CHATTEL MORTGAGE.

Right to Take Possession.—A clause in a chattel mortgage which provides that the mortgagee may take possession of the mortgaged property when he deems himself insecure, and sell the same at public or private sale, vests an absolute discretion in the mortgagee to take possession of the property when he deems himself insecure, and the exercise of this right does not depend upon the fact that the mortgagee has reasonable ground for deeming himself insecure. (*Cline vs. Libby*, Sup. Ct. Wis., Wis. Leg. N., Feb. 20, p. 163.)

CONVEYANCE.

Rescinded—Redelivery of Deeds.—A conveyance may be rescinded by a delivery of the deed and unequivocal acts of abandonment on the part of the grantees. *Huffman vs. Huffman*, Sup. Ct. Tenn., Texas L. J., Feb. 26, p. 404.)

United States Circuit Court.

DISTRICT OF CALIFORNIA.

THURSDAY, MAY 22, 1879.

L. E. BURTON VS. THEODORE LEROY.

1. **SEAL, SCROLL.** A scroll made with a pen, enclosing the letters "L. S.," will be held to be a seal, if the party appending it to his signature to a written instrument intends at the time to adopt it as a seal.
2. **SAME.** It is not necessary to state in the deed, or in the witnessing clause, that the party has affixed his seal, in order to make a scroll a seal, if it is apparent from the instrument and the circumstances under which it was executed, that it was intended to adopt the scroll as a seal.
3. **VOLUNTARY AGREEMENT NOT ENFORCED.** An executory agreement, or an imperfect conveyance, without a valid or meritorious consideration, will not be enforced in equity against the promisor or grantor, or his personal representatives, or subsequent voluntary grantees; and *a fortiori* will not be enforced against subsequent grantees for a valuable consideration.
4. **RELATIONSHIP AS A CONSIDERATION.** The relation of son-in-law does not constitute such a valuable or meritorious consideration as will take a conveyance out of the category of a voluntary conveyance within the rule.
5. **BILL TO DETERMINE ADVERSE CLAIM.** Under Section 738 of the Code of Civil Procedure of California, authorizing the bringing of a suit to determine an adverse claim to land, the complainant can only obtain relief upon the grounds alleged in his bill. If he alleges title in fee, and possession in himself, and an adverse claim as the only grounds for relief, and it appears in evidence that he has neither title nor possession, he can have no relief in equity.
6. **SAME.** Where a complainant asks to have determined an adverse claim to land, upon a bill alleging only title in fee and possession in the complainant, and an adverse claim by defendant, he cannot have a decree charging the defendant with holding the legal title in trust for him, and for a conveyance.

SAWYER, Circuit Judge, delivered an oral decision as follows:

This is a bill in equity, brought under Section 738 of

the Code of Civil Procedure, to determine an adverse claim to land. The land in question was granted by the Mexican Government to Antonio Maria Olivera, and the grant having been confirmed, a patent issued on July 30, 1863. On April 24, 1863, the grantee, Olivera, executed, in favor of Joaquin Tico, an instrument which is presented here, and which was recorded October fourteenth of the same year. The only interest of the complainant in the land is such as is derived under this instrument. It is not clear from the terms of the instrument what it was intended to be. In fact, in what ought to be the granting part of the instrument, there are no terms of grant at all. It would seem that something had been omitted in that part of the document. Subsequently, the word "*cesion*" occurs; but it is not used as a granting term, but by way of recital, referring to some preceding word, with the view of declaring the purpose of the instrument, the "*cesion*" being declared to be for certain purpose, mentioned. No consideration is recited in the instrument, and there is no seal; so that, putting upon it the most favorable construction possible, it is not a deed.

It is not claimed that it is a deed, but it is urged that, although void as a deed, it is good as a contract to convey. There is, however, no consideration whatever expressed, neither a valuable consideration, nor any good consideration. After the name of Joaquin Tico occur the following words, "my son-in-law"—thus, "Joaquin Tico, my son-in-law;" but it is apparent that these words are not intended to express a consideration, but are used as a mere description of the person—to designate the particular Joaquin Tico to whom the instrument was intended to be given. It is possible, certainly, that the instrument was made in consequence of his being a son-in-law of Olivera; but, if so, it is not so stated, and even should that be the case, it is simply a voluntary conveyance, and I know of no authorities which recognize the fact of being a son-in-law as constituting a good consideration. Whatever the instrument is, upon its face it is manifestly a voluntary instrument, possibly given because Tico was a son-in-law.

Subsequently, on September 29, 1855, Olivera conveyed to complainant Burton a portion of this rancho, described by certain boundaries, which include about two thirds of the grant, and in that conveyance no reference whatever is made to any prior conveyance to Tico. That conveyance does not embrace any portion of the premises in controversy, and the lands so conveyed are still owned by Burton. The instrument to Tico purports to convey one half of the rancho without stating whether or not it was an undivided one half, but such would, doubtless, be the construction; while to Burton, by deed of bargain and sale, is conveyed about two thirds of the grant, the westerly part embraced within certain specified boundaries, and the deed contains no exception of any interest previously conveyed to Tico, and no reference to any conveyance to him. On the contrary, the grantor, in the deed to Burton declares that no lien or incumbrance has been created upon the tract.

On September 29, 1855, the same day on which the conveyance was made to Burton, Olivera and wife conveyed to Jose Olivera y Romero that portion of the rancho not previously conveyed to Burton, describing it as all the rancho not conveyed to Burton. In this conveyance, also, no reference is made to the document executed in favor of Tico, or to any conveyance to Tico; but there is a reference to the conveyance to Burton, the deed to Romero conveying all the rancho except the portion previously conveyed to Burton; and in this second deed to Jose Olivera y Romero it is also set forth in express terms that the grantors had neither sold nor conveyed the land described, and that they had put no lien or incumbrance upon it. In this deed to Romero is expressed a consideration of four hundred dollars, which the grantors declare they have received to their entire satisfaction.

The original deed to Romero is not produced, and what it contains I can only infer from the certified copy from the County Records, which is presented in evidence. In that, there is a scroll written with pen and ink, within which the letters "L. S." are written. The deed is witnessed by two witnesses, and acknowledged before the County Clerk,

in the form required by law, by whom it was also recorded, as *ex officio* Recorder.

Whether the original deed had a seal of wax or not we do not know, except so far as the fact can be inferred from the certified copy of the record in evidence; for there is no other evidence on the point. Recorders do not generally, if ever, attempt in their records to make a *fac simile* of the seal. Generally, the record shows by a scroll, with the word "Seal," or letters "L. S." written in it, that a seal was affixed to the instrument recorded, and a certified copy of the record can show no more. That is what this copy shows, and in this respect, this particular instrument is like most of the other numerous deeds introduced in evidence in this case by certified copies from the records, to which no objection has been made on either side, all of which have simply a scroll, with the word "Seal" written within it, the only difference being, that in this instrument the "Seal" is not mentioned in the witnessing clause, while on the others it is; and in this "L. S." is written, while in the other it is "Seal." I am by no means certain, therefore, that I am not justified in presuming that there was, in fact, a seal of wax, or other lawful seal upon the original instrument.

It is claimed on the part of the defendant, that the instrument executed to Tico on April 24, 1853, is void, and conveys nothing; that it is not a deed, and does not pass the title. On the part of the complainant, it is admitted that it does not pass the title, but it is claimed that it is good as an agreement to convey.

As in the conveyance of Olivera and wife to Romero, no reference is made to a seal, either in the body of a deed or in the witnessing clause; it is insisted by complainant that the scroll with the letters "L. S." appended to the signatures of each of the grantors is not a seal, and that, therefore, his conveyance is in no better position than the instrument to Tico. On the other hand, assuming, for the purposes of the argument, that there was only a scroll enclosing the letters "L. S.," and not a seal of wax to the original, it is claimed that no particular character of seal is required;

that it is intended to be a seal, and that the parties could as well adopt a scroll as a seal as anything else. To establish the proposition that this device is not a seal unless it is referred to as such in the witnessing clause, or in some other portion of the deed, the complainant has cited several authorities. From an examination of the cases cited, and others, I think the authorities go to establish the rule, that if the device adopted is intended to be a seal, it is to be regarded as such, as is held in *Ralph vs. Gist*, (4 McCord, 271,) cited by complainant.

The authorities are by no means in perfect accord upon this question. For instance, in the case of *Lee vs. Adkins*, (Minor, 187,) cited on the part of complainant, the judges stood three to two for reversing the decision rendered by the Chief Justice, sitting in the Court below, who held that the device adopted was a seal, although no reference was made to it as a seal in the instrument; so that, in fact, although three of the judges on appeal rule that it was not a seal, yet, as the Chief Justice had decided in the Court below that it was a seal, and as two of the judges upon appeal filed dissenting opinions, the Court was actually equally divided upon the question, and that case can hardly be said to establish the rule as it is claimed by complainant to be. The Chief Justice expressed no opinion on the appeal, for the reason that he decided the case below. In other cases there are dissenting opinions. In the case of *Ramsey vs. Long*, (1 Serg. and Raw., 72,) where a scroll was used as a seal, without reference being made to it in the testation clause, or in the body of the deed, it was held to be a seal, as the Court said it could determine from the face of the instrument that it was intended to be a seal. In the case of *Taylor vs. Glasne*, (2 Serg. and R., 502,) it is held that a scroll of that kind is a seal, if the evidence is such as to so inform the Court that it can determine that it was intended for a seal. The chief point discussed in the cases seems to have been as to what evidence is necessary to determine that the scroll was intended to be a seal.

The great argument against the recognition of the scroll

as a seal in instruments containing no reference to it as a seal, is, that it affords great facilities for fraud, as it may at any time be added to a signature to an instrument which was not sealed at the time it was made. But at common law, where wax was used as a seal, it was not necessary that it should be stated in the deed that the grantee thereunto appended his seal. That is laid down as the law, both in *Comyn's* and in *Rolle's Abridgments*. The simple fact that the wax has been affixed to the paper at the proper place is evidence that it is intended as a seal. But it is held at common law, that the wax itself is not the seal, but the impression upon the wax; that the wax is only the medium for receiving the impression; and in modern times it is held, that if the wax were removed, and the impression made upon the paper itself, the instrument would still bear a seal, as the impression, and not the wax, constitutes the seal. The seal was not required to be of any peculiar device, or of any peculiar name, but might be an impression of any kind, and and one kind of a device might be adopted by a person at one time, and another at another time. The argument, that a scroll should not be accepted as a seal because it may be added to a paper at any time after execution, applies with, at least, equal force in the case of the wax seal, as it is, certainly, as easy to add the latter to an instrument as the former. Indeed, it would be less difficult to append, without detection, the seal of wax than it would be to append a scroll, because, if added later, the latter would be likely to be made with ink and pen different from those used in writing the body of the instrument, or the signature to it, and in such case it would appear that the letters "L. S." were in a different handwriting, or made with different ink from the body of the instrument or the signature.

If the scroll and letters "L. S." are adopted as a seal at the execution of the instrument, they would be likely to be made by either the party who drafted the instrument, or the one who executed it, with the same pen and ink, and this would afford some security.

Then again, it has been held during later years at common

law, that a piece of paper attached in the form of a seal, and upon which there is no stamp or impression at all, is a seal; and the seals upon the very deed from Tico himself, under which the complainant now claims title, is of that description, being small square pieces of plain paper, bearing no impression whatever, attached with mucilage to the document. Such a seal is, certainly, quite as readily attached, and much more easily counterfeited, than a scroll containing two letters; and if such a piece of paper, attached in that manner, is a seal, certainly, a scroll attached for the same purpose ought to be held to be a seal.

The great point of dispute in the cases really has been as to whether or not the device which appears upon the conveyance under consideration was intended to be a seal. This particular instrument is written in the Spanish language, the grantors being native Mexicans. The seal was not necessary under the Mexican law, and was made an essential part of such an instrument in California for the first time upon the adoption of the common law and the acts concerning conveyances in 1850. These parties, therefore, in all probability, were not accustomed to executing instruments with a seal, and were not acquainted with the formula: "In testimony whereof, we have hereunto set our hands and affixed our seals," etc., because the Spanish form was simply, "In testimony whereof we sign our names, or execute, or make firm," as the word *firmo* signifies. As, then, these grantors were not persons who would be likely, from force of habit, to attach seals, they must have attached the scrolls in this case for a purpose, and there could have been no purpose other than to make them seals. This instrument in its form purported to convey land, and was intended to convey land; and the statute at that time, but recently enacted, required a conveyance of land to be made under seal. It was, therefore, not a matter of indifference whether the instrument was sealed or not. We must presume, then, that the parties intending to convey land, and knowing the change in the law, undertook to conform to the statute, and to execute such an instrument as would be effectual for the purpose

intended. They did not insert in the witnessing clause the fact that they had sealed the instrument, but the law did not require that to be done, and they were not accustomed to this formula.

The acknowledgment of the husband was made to this deed, in due form, on the 29th of September, 1855, before the County Clerk, thus conforming to the requisites of the statute in all particulars. The wife does not appear to have been present at that time, as her acknowledgment was made before the same officer on the 15th of October following, and the instrument was recorded on that day. The provisions of the law having been complied with in all these respects, I think, that all these things go to prove that the scrolls were intended to be seals, although no reference to them appears in the witnessing clause of the instrument. These scrolls certainly could not have been appended to a deed in Spanish by these parties by accident, or from the force of habit.

The only question remaining is, as to whether or not the scrolls were affixed at the time of execution. The argument is, that they should not be held to be seals, because they might have been subsequently attached. But we are not to presume that a forgery has been committed, and it would be a forgery by means of the addition of a seal to convert a simple contract into a deed. This is not an instrument which might indifferently be executed with or without a seal. The party who took the acknowledgments, the County Clerk, was one of the witnesses to the deed; and he would be likely to know whether or not it was sealed. As he took the acknowledgments of both grantors, and witnessed it, it is probable that he retained the document in his hands from the 29th of September, the day of its date and the time when it was acknowledged by the husband, until the 15th of October, on which day it was acknowledged by the wife, *and recorded*; and as the scrolls were upon it when it was recorded, it is hardly probable that they were not there at the time of acknowledgment. A forgery could hardly be committed upon the record as well as upon the deed. The date of the record and of the acknowledgment of the wife are the

same, so there was no interval between the witnessing, acknowledgment and record, all of which were done by the same party, the County Clerk.

I am, therefore, disposed to think, and I so hold, that the scrolls upon this instrument were by the grantors adopted as, and intended for, seals, and were affixed at the time of the execution; and, that being so, that they are in fact seals, within the meaning of the statute, and the instrument is a deed.

But if it were not a deed, then, under the law, it would be a valid contract to convey, because there is a consideration expressed in the instrument. If that is the case, there is an interest vested in the grantee, which has come by a series of conveyances to the defendant, and a conveyance could be enforced in equity; but if it were not a contract to convey upon a consideration, but only a voluntary contract, it would, at least, still stand on an equal footing with the instrument to Tico. In either of these aspects, the instrument to Tico would not be enforced in equity as an equitable contract to convey even against Olivera himself. It is well settled that a voluntary executory contract—a contract without either a valuable or meritorious consideration—cannot be enforced, except in some instances, in favor of a wife or child, even against the grantor, and never against subsequent purchasers, for a valuable consideration, or even against subsequent voluntary grantees. In his Equity Jurisprudence, Sec. 706 *a*, Story says:

“ In respect to voluntary contracts *inter vivos*, it is a general principal, that Courts of Equity will not interfere, but will leave the parties where the laws find them. In respect also to gifts and assignments *inter vivos*, Courts of Equity will enforce them only when the gift or assignment is perfect and complete, so that nothing further remains to consummate the title of the donee. For, if the gift or assignment is imperfect, or any further act remains to be done to complete the title of the donee, Courts of Equity, treating the donee as a mere volunteer, will not aid him to carry it into effect, either against the donor or against his

“legal representatives.” Again, Section 787: “In conclusion, it may, however, be proper to remark, that all the cases for a specific performance, which we have been examining, presuppose the contract to be between competent parties, and founded upon a valuable or meritorious consideration; for Courts of Equity will not, as we have seen, and shall presently more fully see, carry into specific execution any merely nude pacts or voluntary agreements, not founded upon some valuable or meritorious consideration.” And in Section 793, b: “We have alluded to the distinction between contracts founded upon a valuable consideration, and such as are voluntary. Thus, if a party should enter into a voluntary agreement to transfer stock to another, or to give him a sum of money, or to convey to him certain real estate, Courts of Equity would not assist in enforcing the agreement, either against the party entering into the agreement, or against his personal representatives, for the party contracted with is a mere volunteer. The same rule is applied to imperfect gifts, not testamentary, *inter vivos*, to imperfect voluntary assignments of debts and other property, to voluntary executory trusts, and to voluntary defective conveyances. Thus, where a parent has assigned certain scrip to his daughter by a written assignment, which operated as an equitable assignment only, and not as a legal transfer, a Court of Equity refused to compel the donor or his executors to perfect the gift. So, where a lady by a writing, assigned a bond of a third person to her niece and delivered the bond to the latter, and then died, a Court of Equity refused to enforce the assignment against the executor, or to decree payment of the money by the obligor to the niece * * * * *

“So, where a husband executed a document which was attested by two witnesses, giving to his wife a freehold house in which they resided, but afterward died without making a will, and the heir at law recovered a verdict for the possession of the house against his wife, it was held, that the gift to her was incomplete, and a bill asking that

“ the heir at law might be declared a trustee of the wife was “ dismissed.” *Ellison vs. Ellison* (1 White & Tudor, Leading cases in Equity, Marg., p. 251, 2,) is a leading case on the subject. Lord Chancellor ELDON, in deciding this case, said: “ I take the distinction to be, that, if you want the “ assistance of the Court to constitute you *cestui que* trust, “ and the instrument is voluntary, you shall not have the as- “ sistance for the purpose of constituting you *cestui que* “ trust; as upon a covenant to transfer stock, etc., if it rests “ in covenant, and is purely voluntary, this Court will not “ execute that voluntary covenant. But if the party has “ completely transferred stock, etc., though it is voluntary, “ yet the legal conveyance being effectually made, the equit- “ able interest will be enforced by this Court. That dis- “ tinction was clearly taken in *Colman vs. Sarrel*, indepen- “ dent of the vicious consideration. I stated the objection “ that the deed was voluntary, and the Lord Chancellor “ went with me so far as to consider it a good objection to “ executing what remained in covenant.” The point is illus- trated by an elaborate note of many pages, cited from the English authorities, followed by an equally elaborate note citing the American authorities. The American editor, on page 288, says: “ The principle is well established in this “ country, that an executory agreement, or an imperfect con- “ veyance, upon a merely voluntary consideration, will not “ be enforced or aided in equity, (*Caldwell vs. Williams*, 1 “ *Bailey's Equity*, 175, 176; *Crompton vs. Vessee*, 19 Ala.; “ 259; *Hayes vs. Kershaw*, 1 Sandford's Ch., 258; *Reid vs.* “ *Vanarsdale*, 2 Leigh., 560; *Evans vs. Battle*, 19 Alabama, “ 398; *Pinkard vs. Pinkard*, 23 Id., 649; *Holland vs. Hen-* “ *sley*, 4 Clarke, 222,) and hence a gift of real or personal es- “ tate will be void, unless so far executed as to pass the “ legal title, or attended with some peculiar circumstances “ which give rise to a special equity. (*Pringle vs. Pringle*, “ 9 P. F. Smith, 281.) ‘It is a clear, general rule, said “ Chancellor KENT, in *Minturn vs. Seymour*, (4 Johnson's “ “ *Chancery*, 98—500,) that a bill does not lie to enforce a “ “ mere voluntary agreement. The language of the books,

“ ‘from the earliest to the latest cases, is uniform in support of the doctrine, that a voluntary defective conveyance, which cannot operate at law, is not helped in equity in favor of a volunteer, where there is no consideration nor any accident or fraud in the case. To entitle the party to the aid of this Court, the instrument must be supported by a valuable consideration, or, at least, by what a Court of Equity considers a meritorious consideration, as payment of debts or making a provision for a wife or child.’ To the same effect is *Acker vs. Phoenix*,) 4 Page, 305—308.) ‘Voluntary executory agreements,’ said HENDERSON, J., in *Dawson vs. Dawson*, (1 Devereux equity, 93—99,) ‘receive no aid, either from the Courts of law or of equity. The parties stand upon their rights, such as they are, and hence it is a maxim, that defective voluntary agreements will not be aided in equity, any reformation of a conveyance being an execution of the original agreement, so far as the conveyance is varied. The same motive which induces a Court to refrain from enforcing an agreement, no part of which is executed, prevents it from enforcing any part of it. The want of a consideration is, therefore, universally a good defense to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement.’ (See also *Banks vs. May’s Heirs et al*, 3 Marshall, 435, 436; *Bibb vs. Smith*, etc., 1 Dana, 580—582; *Darlington vs. McCool*, 1 Leigh., 36—42; *Tiernan vs. Poor et ux*, 1 Gill & Johnson, 217—228; *Forward et al vs. Armstead*, 12 Alabama, 124—127; *Shaw, Guardian*, etc., vs. *Burney et al*, 1 Iredall’s Equity, 148—150; *Pinkard vs. Pinkard*, 14 Texas, 331; *Bouclius vs. Dyer*, post, note to *Lester vs. Foxcroft*.)”

Taking the case in its strongest and most favorable aspect for the complainant, under the rule established by the authorities cited, this instrument to Tico, whatever it is, still rests in agreement. It is but an unexecuted promise to convey without consideration. If we regard the conveyance to Jose Olivera y Romero as a deed, then there is a valid conveyance, there being a consideration expressed—or even if

no consideration were expressed, one would be implied from the seal; and the legal title passed by it to Romero, and from him through subsequent conveyances to the defendant.

To get that title out of defendant, the complainant here should, of course, if he has any equitable title as against the legal title in defendant, file a bill for a specific performance, or to charge defendant as his trustee. If the defendant here, who claims under Romero, has only a contract to convey, still it is a valid contract, because a good consideration is expressed, and he could compel a conveyance from Olivera. Even if we go beyond that, and say, that he has merely a voluntary contract, he is still, under the authorities that I have cited, as compared with the complainant, in the better position, and equity will not interfere to aid complainant.

In regard to this case, I will add, that I do not see that there are any equities in favor of the complainant. It does not appear that Olivera himself ever after its date treated this so-called conveyance to Tico as of any consequence, because, when he subsequently conveys to Burton two thirds of the rancho, embracing the undivided half claimed to be in Tico, he makes no mention of any prior conveyance; but on the contrary, says he has not incumbered it in any way, and in all his subsequent conveyances to other parties, he invariably alludes to the conveyance which he had made to Burton, in which very conveyance, which is a deed of bargain and sale, he declares that he has not created any lien or incumbrance upon the land. In his deed to Jose Olivera y Romero he conveyed that portion of the rancho which he has not heretofore conveyed to Burton, thus recognizing the conveyance to Burton, but making no reference whatever to this instrument to Tico, and more than that, he says, in the conveyance to Romero, that he has never sold, or conveyed, or incumbered, or put any lien upon the premises conveyed thereby, which is inconsistent with his recognition of any right in Tico; and Burton was a witness to this deed. It appears, then, that neither Olivera nor any one else ever treated Tico as having any interest in the land,

and there is nothing in this case to show that Tico ever claimed any right to or interest in it under the instrument to him. The only time that Tico ever appears in connection with the land at all, is when, after the title had once been in Burton and had passed through him to defendant, he, Burton, procured from Tico a subsequent conveyance by quit-claim deed.

With the exception of making this last conveyance at complainant's solicitation, for a nominal consideration, it does not appear that Tico has made any claim whatever to any interest in the land, although more than a quarter of a century has elapsed since he executed the instrument relied on from Olivera. It appears from the testimony in the case, that sometime in the fall of 1853, or early in 1854, a man, casually visiting the premises, found Olivera living on the land in one place, one of his sons living on it a short distance from him, and still farther up the cañon he found Tico living upon the land; but there is nothing to show the character of his occupancy, and that is the only evidence presented which bears upon that point. This was a common mode of living among the old inhabitants, the sons building houses and living on the land of the father until they could get a grant for themselves. As has been stated, subsequent to the conveyance from Olivera to Burton, Olivera conveyed the remainder of the rancho to Jose Olivera y Romero, who conveyed to Antonia Arrelaues in 1858. On December 9, 1862, Arrelaues conveyed to complainant Burton all the rancho Casmali not before conveyed to Burton by Olivera—that is to say, the premises in question. On February 13, 1863, complainant Burton quit-claimed the premises to Estudello, whose title has been conveyed to defendant. There are other conveyances to defendant not necessary to specify. The conveyances through which defendant claims were trust deeds, executed as a security for a loan of some fifty thousand dollars from the Hibernia Bank, for the payment of which Burton himself was a surety. Proceedings were had for foreclosure of the trust deed, and Burton took an active part in them, his object being to have such a sale made as

would release him from personal liability; and the sale made under the trust deed passed to the purchasers, at that sale, whatever title in the land he, Burton, and Jose Olivera y Romera had received subsequent to the instrument executed to Tico, and that title has since passed to the defendants in this case. Burton's counsel was present at the sale of the premises, and the property was bid off and passed to the purchasers, according to the arrangement which had been agreed upon, in order that he, Burton, might be relieved from this responsibility.

In 1863, after these transactions had occurred, Burton procured from Tico a quit-claim deed for the whole rancho, including the premises in question, being the deed upon which he now relies for title as against defendant. Packard, who was superintending the business affairs of Burton, the latter being an invalid, testified, that the *quit-claim* from Tico was procured through his advice, and by his arrangement. The consideration expressed in the deed is only two hundred dollars. The sum of two hundred dollars was no consideration for a half interest in a rancho containing two leagues, after the grant had been confirmed and a patent issued. Manifestly, in taking that quit-claim, he had no other intention than to clear a cloud from his own title to his share, some two thirds of the rancho. He was a witness to the deed from Olivera to Romero, and knew all the circumstances of the case. Up to that time, it does not appear that Tico had set up any claim to the premises. There is nothing in the evidence to show that he ever made any claim to, or had any interest in, the land, except the fact that he received that instrument from Olivera, whatever it is. The use now sought to be made by Burton of the quit-claim upon a nominal consideration, is evidently an after-thought, and would be grossly inequitable as against his prior grantees and the defendant holding under them. The intrinsic substantial equities, as well as the legal rights, therefore, are not in favor of the complainant, but with the defendant.

Again, Burton, in his bill, alleges that he is seized in fee of these premises, and that he is in possession. He alleges

title in fee and possession as his grounds of action. If he has only an equitable claim here, the legal title being in the defendant, the grounds upon which his bill is based are not such as would entitle him to equitable relief. He must obtain his relief according to the allegations of his bill. He has set up a title in himself, but as we have seen, it is not in him, but in defendant. If he has anything at all, it is this agreement to convey. The title is in the other party. If he has any right at all, it is to charge the other party as a trustee for his benefit, and to require a specific performance. The bill is not framed in that aspect, or for that purpose. If the other party is a trustee, and the complainant wishes to divest him of that title, the bill must be framed in that aspect, and the issues would be entirely different from those raised by the bill in this case, and the defense might be different. In an action of this kind, it is not necessary to set out in the bill the character of the defendant's adverse claim, for the complainant may not know it. He may call upon the defendant to state what his claim is, but the complainant must be presumed to know the character of his own title, and he must state it correctly, if he states it at all. At all events, as in other cases, he will be limited in his relief to the case made by the bill. He cannot obtain affirmative relief upon the defendant's answer alone. If it be sufficient, as held in the California cases, though denied by the Supreme Court of the United States in a case arising under a similar statute in Oregon, to simply allege possession, it is because possession is *prima facie* evidence of title in the possession. But upon a bill alleging possession alone as the grounds of action, if it should turn out that the *prima facie* case of title made by possession should be overthrown by evidence introduced showing title to be in the defendant, I apprehend that relief could not be given complainant on some other grounds, not stated in the bill. The defendant is only bound to meet the case presented by complainant's bill. In this case, if complainant neither had title nor possession, or if being in possession the *prima facie* case of title made by possession is overthrown by title shown in defendant, all grounds for relief alleged fail.

The complainant alleges both title in fee and possession. We have seen that he has not title, but that title is in defendant, and that rebuts the presumption arising from possession, if possessed he was. But I am not satisfied that he was in possession. The only evidence to that effect is the testimony of Packard, and that is extremely loose. His testimony is simply in effect, that Burton has not for years past been in a condition of health or of mind to attend to his business, and that he, Packard, has had charge of Burton's affairs; that he is the man who knows the facts bearing upon this subject; that in 1871 (Burton got his quit-claim in 1863) he leased—what? Not the specific land now in question, but “All his rights in the rancho of Casmali,” first to Arques, who held to 1873, then transferred his lease to Castaños, who occupied till 1875, when Burton leased to Conway; and that they took possession under their lease, and paid rent. That testimony is extremely indefinite, because Burton undoubtedly owned about two thirds of the Casmali rancho, being all the part lying westerly of a designated line, but not including any part of the premises in question upon which portion so owned by him, the leases could operate. The dividing line between the two tracts divides them into what is now called the Casmali and the Ospe. That line is certain. Conway himself testifies, that he did not lease from Burton that part of the rancho which is conveyed to the defendant, but that he leased that from Steinback and LeRoy; and he further testifies, that the line was surveyed under his direction, and that Arques himself, while he was in possession under Burton, pointed out that line as the line between the land of the two parties in interest. Arques, he says, did not pretend to be in possession of all the rancho under Burton, and he says the same with reference to Castaños. He says that he himself never claimed to be in possession under Burton of that part of the rancho now called Casmali, but only of that part called Ospe. The other part he claimed to hold under Stienback, LeRoy's agent, and paid rent to them for it. He also testified, that McPhaul held possession of that portion of the rancho under Stienback and LeRoy.

He testifies, that Sexby was corralling cattle for McPhaul on the part now called Casmali, and whenever his, Conway's, cattle, or any others went from Ospe over on to that part claimed by the defendant, they were always corralled, and he was compelled to pay money in order to get them out. Arques was the first one of the men who, as Packard states, took a lease from and attorned to Burton; but Conway testifies that he, Arques, never claimed the part in question under Burton, but on the contrary, claimed under and paid rent to the other party. Sexby also states the same thing, that these parties, claiming under Burton claimed up to that line and no farther. These witnesses, while in possession state these facts, showing the title under which they held. Then, there is evidence that prior tenants paid rent to Nugent for the Estudellos, defendant's grantors. I think, then, that the testimony shows that Burton was not in possession of this land, but that the possession was in the other parties—the defendant and his grantors—so that Burton's claims to title and possession both fail, unless the testimony is grossly at fault. The testimony of Packard is very loose, while that of the other witnesses named is specific. Packard nowhere testifies in specific terms, that he, as Burton's agent, leased this specific portion of the land, while, on the other hand, the parties to whom he leased testify and state that they did not hold possession of the land in question under Burton. His statement of a lease to *all Burton's interest in the Casmali rancho* is not necessarily inconsistent with the testimony of the other witnesses, that they held the premises in question from defendant and his grantors, for Burton really had no interest in this part of the rancho. In my judgment, the testimony shows that the possession was in defendant, and not in Burton. There is to, my mind, not one equivocal act of possession in Burton satisfactorily shown by the testimony. The defendant held and possessed under deeds of bargain and sale, purporting to convey the whole, and declaring in express terms, that there had been no previous sale or conveyance, lien or incumbrance, and this possession must have been adverse. I think, then, that

the complainant is not entitled to the relief demanded, or to any relief; 1st, because he has failed to prove the case which he alleges in his bill; 2d, because it appears that he is, at best, a mere volunteer promisee, claiming against parties who have acquired title for a valuable consideration, and, therefore, a Court of Equity will not interfere to enforce his claim; 3d, because the equitable, as well as the legal title and rights are with the defendant, and not with the complainant.

It follows, therefore, that the complainant's bill must be dismissed, and it is so ordered.

J. J. Williams for Complainant.

B. S. Brooks for Defendants.

Mr. Williams—Considering the Tico deed to be a mere contract to convey, and considering the deed under which the defendants claim to convey the legal title, I should like to have the decision plump as to whether or not a bill to determine an adverse claim can be maintained against the legal title.

The Court—I don't think it can, unless you allege in the bill the facts which give you the equitable title, and ask that defendant be charged as trustee, or that a conveyance be made. Upon a bill, merely alleging the legal title to be in the complainant, if it turns out that he has not the legal title, he would not be entitled to relief. He must recover upon the allegations of his bill, or not at all. The defense in the two cases might be wholly different. The defendant is only called upon to meet the case made by the bill.

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IN the U. S. Circuit Court, for this district, last week, in the case "*United States vs. Wm. S. Chapman*," on taxation of the cost bill, (it being a suit to vacate and set aside a United States patent, under which defendant claimed,) it was admitted that the action was brought by the U. S. District Attorney, under direction of the Attorney General, at the request of one J. S. Polack, claiming the same land under adverse title. It was further admitted, that permission to bring the suit was granted upon condition that Polack indemnify the Government against all costs and expenses in the suit; and that all disbursements in the suit had been made by said Polack, of his own money, and that no money of the United States whatever had been disbursed in the suit. Upon this showing, it was claimed by Nourse, for defendant that:

1. Inasmuch as disbursements are held to be taxable in the cost bill, merely for the purpose of reimbursements, these disbursements could not be taxed in favor of the United States, the plaintiff, because the United States had disbursed nothing, and was not liable for any disbursements; payment having been actually made, and the United States expressly released from the responsibility therefor.

2. That this was also just, as between Polack, the real plaintiff in interest, and defendant Chapman, inasmuch as

in case judgment had gone for defendant, he could have recovered no costs; no costs being ever taxable against the United States as a party, and Polack not appearing in the case as relator.

So, if these disbursements be allowed to be taxed, the position of things would be, that defendant Chapman was liable for costs if defeated, but could recover no costs whatever if successful in the suit, while Polack gets his costs if successful, and would not be liable for defendant's costs if defeated. Judge SAWYER overruled this objection to the cost bill, and held the defendant to be liable for costs. So it may be deemed settled in this Court, that if the United States bring suit against an individual to vacate a United States patent, at the request of another party, the defendant will be cast for costs if beaten.

THE call for members of the bar in this city to meet for consultation, respecting the selection of proper candidates for Superior Judges for this city and county, was responded to by more than two hundred. The alleged object of the meeting was to devise means of placing a ticket before all the political nominating conventions, composed of men selected by the bar for their known integrity and ability, irrespective of party affiliations. It is claimed, that the judiciary should be selected outside of political parties; and that the bar is more competent to select it, being in daily contact with those men from whom the selection must necessarily be made. Immediately after organizing, a motion was made to go into an election for twelve candidates for the Superior Court Judgeships. Strong opposition was at once raised, and unqualified hints made that the corner, at least, of a well-filled state could easily be discovered. A motion finally prevailed, appointing a committee to wait upon such gentlemen as should be placed in nomination, and ascertain if they would make the sacrifice and serve the public. Nominations were then in order, and for the lack of space and time we cannot give the full list. Other names may be given in to the committee, so that it may reasonably be said, that the whole bar is in nomination, with here and there an exception.

There seems to be no criterion; no standard for nomination or election; no degree of learning; no amount of experience; no voucher of integrity is demanded. In this race there is but one qualification needed—popularity. The man who can muster the fullest corps of friends at the adjourned meeting—27th instant—will carry off the prize, of whatever value it may be, provided, it happens that the election shows seven Republicans and five Democrats. It cannot be supposed that this special allotment can *happen*, yet under the programme it must so be to insure unanimity. We concur in the general sentiment, that the judiciary should be selected without a view to party affiliation, but we have some doubts as to whether the bar as a whole, is the best judge of the men who should form it, for respecting the qualifications of those that would accept the position, each member of the bar would reserve the right to be his own judge, and the selection would be as varied as the minds of the different men. This would be true as to all members, except those who have gained a reputation and a business that forbids a doubt as to their superior qualifications; but those men would not accept the candidacy. But if they were the best judges, there are no safe means of exercising this judgment. As has been seen at the first meeting of these gentlemen, nothing was devised, nothing suggested that seemed safe and certain. Each candidate must stand or fall by his popularity, not his merits. We regret that we are forced to the conviction that the plan is impracticable.

Supreme Court of California.

MAY TERM, 1879.

[No. 6,549.]

[Filed June 2, 1879.]

STINE CANAL COMPANY,

vs.

KERN ISLAND IRRIGATING CANAL CO.

The appropriation of water by the defendant corporation prior to August, 1874, was of the waters of Old South Fork, and not of Kern river.

The right of the defendant corporation to divert the waters of Kern river, based upon its appropriation in August, 1874, is subordinate to that of the several corporations which are joined as plaintiffs—except the Goose Lake Canal Company—to divert the several amounts by them respectively appropriated prior to August, 1874.

The stream of water, known in this case as the "Old South Fork," issues from Kern river, and from the point where the waters are diverted, the stream flows as a direct stream. The waters appropriated by the defendant—the Kern Island Irrigating Canal Co.—prior to August, 1874, are to be regarded as the waters of the "Old South Fork," and not the waters of Kern river. In August, 1874, the defendant appropriated a portion of the waters of Kern river, and conducted the same by means of a canal to the Old South Fork, from which it was taken out lower down the stream, and so continued to do up to about the spring of 1878, when the waters were conveyed through the canals of the defendant, without uniting the same with the Old South Fork. All the water companies which are joined as plaintiffs, except the Goose Lake Canal Company, appropriated portions of the waters of Kern river, prior to the appropriation by the defendant in August, 1874, and, so far as is shown by the record, their right to the portions of the water by them respectively appropriated, is superior to that of the defendant. The right of the defendant, based upon its appropria-

tion, is subordinate to that of the several plaintiffs who had made prior appropriations, and the defendant is not entitled to divert the waters of the river to such an extent that a sufficient amount thereof will not follow down the river to supply the plaintiffs above mentioned the amounts of water by them respectively appropriated, before the appropriation by the defendant in August, 1874.

The plaintiffs, other than those last above mentioned, have not made out a case entitling them to an injunction, nor have any of the plaintiffs shown that they are entitled to an injunction, except as against the Kern Island Irrigating Canal Company.

The order made on the first day of April, 1879, is reversed and cause remanded, with directions to the District Court to modify the preliminary order for an injunction made and filed by the District Court on the 17th day of March, 1879, so that it shall thereby be ordered and adjudged, that the defendant, the Kern Island Irrigating Canal Co., and its officers, agents, attorneys, servants and employes, and all persons acting in its, or their aid, do absolutely refrain and desist, until further order in this case, from diverting, taking, appropriating, or using the waters of Kern river, above the head of the Stine Canal Co.'s ditch, described in said complaint, so as to diminish the waters of said river, to such an extent that they will not supply to each of the water companies mentioned in the said complaint as plaintiffs, except the Goose Lake Canal Co., the amount of water which it is alleged in the complaint they have the right respectively to appropriate and divert from said Kern river—and that a writ of injunction issue in conformity with such order.

Remittitur forthwith.

[No. 5,851.]

[Filed June 2, 1879.]

HALE vs. McLEA.

1. On the facts of this case, as admitted by the pleadings or found by the Court, the defendant could, at most, exercise no greater rights in respect to the diversion or use of the waters of the subterranean

stream flowing across his land to the spring of the plaintiff, than if he had been an upper and the plaintiff a lower riparian owner on a surface stream flowing across their respective lands.

2. On the facts admitted, or found, the defendant was not entitled to divert the whole body of the stream.
3. Whether the upper proprietor on a subterranean stream can exercise the same rights as against a lower proprietor, in respect to the diversion and use of the water, as though it was a surface stream, not decided.
4. Whether the incidental obstruction, or diversion, of a subterranean stream in the prosecution by an upper proprietor of a mining, or other legitimate enterprise, beneath the surface, can be made the foundation of an action by a lower proprietor, not decided.

CROCKETT, J., delivered the opinion of the Court.

An examination of the English and American decisions on the questions of law involved in this appeal leads us to the conclusion that on the facts admitted by the pleadings, or found by the Court, the right of the defendant as against the plaintiff to use the water of the subterranean stream, which is the subject of the action, is at most, no greater than if it was a surface stream, on which the defendant was the upper and the plaintiff a lower riparian owner. Tested by this rule, the utmost that can be claimed for the defendant on the facts is, that he is entitled to take from the stream as much water as he needs for watering his cattle and for domestic uses, such as cooking, washing and the like, leaving the surplus to flow to the spring of the plaintiff in its natural channel. But the findings show that the defendant has diverted the whole body of the stream through pipes in such a manner that no portion of the water can reach the spring; and the surplus at the commencement of the action was running to waste, as appears from the admissions in the pleadings. If it were a surface stream, the plaintiff would be entitled to have it flow to and across his lands, in its natural channel, subject only to the right of the defendant to use so much of the water as is necessary to supply its natural or primary wants as above indicated; nor, on the facts found, can the defendant exercise any greater right in respect to a subterranean stream. Assuming, therefore, that the rights of the

defendant are precisely the same as though it was a surface stream, he has exceeded them by diverting the whole body of the water from its natural channel, instead of allowing the surplus to flow to the spring in its accustomed bed.

But the exigency of the case does not require us to decide that the defendant has the same right in respect to a subterranean stream, as though it was a surface stream flowing across his land; and our decision is only to the effect that, if it be assumed his rights are the same, he has, nevertheless, exceeded them by diverting the whole body of the stream, instead of allowing the surplus to flow to the spring in its natural channel.

There is no question in this case involving the right of a riparian owner to the use of water for purposes of irrigation; nor is the point before us, whether or not a land-owner may be restrained from diverting or obstructing the flow of an underground current running in a defined channel across his land, and which supplies a spring or well on the adjoining lands, if it become necessary to divert or obstruct the stream in the prosecution of the business of mining, or any other legitimate enterprise, on his own land; nor to what extent, if at all, it would affect the question, if the underground current was not known to exist, until the fact was discovered in the prosecution of the work. These are grave questions, which the exigency of the present case does not require us to decide.

Judgment affirmed.

We concur:

McKINSTRY, J.

NILES, J.

I concur in the judgment, on the ground that the defendant, in my opinion, has no right to divert the waters of the subterranean stream, if the spring of the plaintiff will thereby be materially injured.

RHODES, J.

United States District Court,
DISTRICT OF CALIFORNIA.

[No. 2,382.]

[Filed April 30, 1879.]

H. B. TICHENOR *et al.*,

vs.

STEAM TUG "HIAWATHA."

The lien under the State law of a material man, for repairs furnished to a vessel, in her home port, has priority over that of a mortgagee, under a duly recorded prior mortgage.

HOFFMAN, J., delivered the opinion of the Court.

That the lien under the State law of a material man for repairs furnished to a vessel in her home port has priority over that of a mortgagee under a duly recorded prior mortgage, has been so often decided that I think it unnecessary to do more than to state the principle and cite the authorities which the industry of counsel has collected in his brief.

The principle is concisely stated by Mr. J. Curtis, in the case of *The Keersage*, (2 Curtis, 422,) as follows:

"The mortgagees can have no claim to be preferred over the lien holder, because of their priority in time; for their interest in the vessel is as much subject to the statute lien as the interest of any other party."

This principle is recognized in the following cases: *Brown vs. The Propeller W. T. Graves*, xiv Albany L. Journ., 408; *Scott vs. Delahmah*, 65 N. Y., 128; *The Island City*, 1 Low., 375; *Donnell vs. The Starlight*, 103 Mass., 227; *Hull of a New Ship*, Davies 199; *Steamers Raleigh, Camant and Astoria*, 2 Hughes, 44; *Shrodes vs. The Collier*, 2 Pitts, 304; *Pitts vs. Leg. Journ.*, vol. ix., pp. 73, 193; *The St. Joseph*, Brown's Adin., 202; *Kellogg vs. Brennan*, 14 Ohio, 72; *Provost vs. Wilcox*, 17 Ohio, 359; *Jones vs. Keen*, 115 Mass., 170.

In the case of *The William L. Graves*, (14 Blatchford, 189),

Mr. J. JOHNSON, Circuit Judge, considers the effect of the provisions of § 1 of the Act of Congress of July 29, 1850, (of U. S. Stat. at Large, 440,) on the liens of mortgages.

That section provides that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the Collector of Customs where such vessel is registered or enrolled; *provided*, that the lien by bottomry on any vessel created during her voyage by a loan of money or materials necessary to repair, or enable such vessel to prosecute her voyage, shall not lose its priority or be in any way affected by the provisions of this act." With reference to this proviso Mr. J. JOHNSON observes:

"The obvious purpose of this proviso was to make it entirely clear that a bottomry bond did not come within the statute, requiring certain instruments to be recorded. It might otherwise have been contended that it was in some sense a hypothecation of the vessel, and, therefore, required to be recorded. It will be observed, that the proviso is confined to liens by bottomry. If this proviso be construed to mean that such a lien only, is out of the purview of the statute, and that all other liens are postponed to that of a mortgage, then the claims of salvors, and all those having other strictly maritime liens would be thus postponed to the subversion of the whole principle upon which efficacy is given to such claims, and the overthrow of the best settled and most salutary principles of the maritime law. Indeed, any principle upon which this statute can be expounded to give such a priority to a recorded mortgage, would also extend to bills of sale and other conveyances recorded under the same law, and thus practically overthrow the whole scheme of the maritime law on the subject of maritime liens. This statute, I conclude, therefore, has no relation to the question involved, and the lien of the libellant is left to stand upon the

“statute of New York, which the Courts of the United States enforce in the Courts of Admiralty.”

The case of *The Lattawana*, (21 Wall., 558), though not directly in point, seems impliedly to recognize the general doctrine I have stated.

In that case, the contest was between domestic material men and mortgagees, who petitioned against remnants and surplus in the registry.

Some of the supplies had been furnished prior to the execution of the mortgage, and some, subsequently. But the Court takes no notice of this circumstance. The claims are all treated as standing on the same footing with regard to mortgagees.

They were rejected, because the liens for them had not been perfected as required by the State law.

There is no intimation that if the fact had been otherwise, the claims of the material men would not have been preferred to that of a mortgagee, whether prior or subsequent. Such seems to be the necessary result of the decision.

The Court holds, that by the maritime law, as received in the United States, domestic material men, (so-called,) have no lien on the vessel; but that the States may, by statute, create such liens.

Their contracts, however, are maritime, and the liens given by State laws can be enforced in the Admiralty Courts of the United States.

It is well known that mortgagees have no right to foreclose their mortgages in the Admiralty.

When, however, the Court finds itself in possession of remnants and surplus, which it is required to distribute, the lien of the mortgagee, like that of an attaching creditor, will be recognized and enforced. In no other way does the Court take jurisdiction of the claim. But this remnant and surplus can only result after all maritime and *quasi maritime* liens have been satisfied.

In this last category, liens attached by State laws to the contracts admitted to be maritime of domestic material men, must be placed.

It follows, therefore, that the mortgagee cannot now be heard in support of his claim until the domestic material man is paid.

An order will be entered directing the demands of the material and supply men to be paid out of the fund remaining undistributed in the registry of the Court; the balance remaining, if any, to be applied to the satisfaction of the demand of the mortgagee.

[No. 2,365.]

[Filed May 14, 1879.]

DAVID BRUCE,

vs.

175 TONS OF WHEAT, LADEN ON BOARD THE
BRITISH SHIP "CAMPERDOWN.

The only question presented by the pleadings in this case is whether a charterer, who has agreed to furnish a full cargo to a vessel—"the vessel and owners to have a lien for all freights, dead freight and demurrage"—can, after placing a portion of the cargo, transfer the same by way of sale or mortgage to a stranger, so as to enable the latter, after the charter has announced his inability to complete his contract, to hold the same subject only to the lien for freight on the portion of a full cargo transferred to him.

I do not think it necessary to cite authorities on this point, for the language of the contract is clear and unmistakable. It provides for a lien for all freights, dead freights and demurrage. It is evident that all and every part of the cargo shipped is liable not only for the freight due on what may be shipped, but for "dead" freights, that is, freights which would have been due on the merchandize sufficient to make a full cargo, which was not furnished to the vessel.

The delivery of the mate's receipt in no manner affects the rights of the parties. It was simply an acknowledgment that so much cargo had been received on board—a fact not

disputed, and on the existence of which the appellant's rights depend.

The damages to be recovered are the difference between the amount of freight which would, under the contract, have been earned, if a full cargo had been furnished, and which the vessel will earn on a substituted cargo, if the master has obtained one, or might in reasonable diligence have done so.

If the parties cannot agree upon the damages, the matter will be referred to a commissioner to take testimony and report.

Supreme Court of Oregon.

MAY, 1879.

JAMES M. MOORE, RESPONLENT,

VS.

THE WILLAMETTE TRANSPORTATION AND LOCKS
CO., APPELLANT.

Opinion by BOISE, J.

The plaintiff brings this action to recover possession of the undivided seven fifteenths of the tract of land described in the complaint. His theory was, that the whole of the tract described was within the lines of the donation claim of Robert Moore, deceased, who was the father of plaintiff. The proof, however, showed that a small portion was outside the lines of the patent, and the plaintiff's recovery, by the verdict of the jury, is limited to so much as was proved to be within such lines. Plaintiff's interest in the premises in dispute arises in the following manner: Robert Moore took a donation claim under the act of Congress, approved Sept. 27, 1850, at the Willamette falls. The final survey of this claim was made in 1856, and never changed, so far as the lines about the land in dispute are concerned. Said Robert Moore died in Clackamas County in 1857, leaving a will, the effect of which was to leave one fifth of his donation claim to Jane Painter, his daughter;

one fifth to Robert M. Moore, his son; one fifth to Robert Moore, Jr., his grandson, and son of the plaintiff; one fifth to Mildred M. Moore, his daughter; and one fifth to R. C. Crawford, in trust for the plaintiff, coupled with a power to sell after ten years. In 1878, before the commencement of this action, Crawford sold his fifth to the plaintiff. Robert Moore, Jr., died on or before March, 1869, intestate and without issue. Mildred M. Moore died in or about February, 1871, intestate and without issue, being then a *feme sole*. The plaintiff took three fifteenths by his purchase from Crawford, three fifteenths as the heir of his son, Robert Moore, Jr., and one fifteenth as the heir of his sister, Mildred M. Moore—seven fifteenths in all.

The undisputed evidence of plaintiff's witnesses established fully a *prima facie* case to this extent. The defendant's answer undertakes to set up three defenses:

1st. Admitting the possession of the premises in question, by defendant, pleads that defendant is the owner in fee-simple of said premises, and of every portion thereof.

2d. Alleges that defendant is the owner in fee-simple of the undivided one third of one fourth, and William P. Doland is the owner in fee-simple of the undivided one third of one fourth, and James K. Kelly is the owner in fee-simple of the undivided one third of one fourth of the whole of said premises, being the whole of the interest which the said James M. Moore had in said premises, between the 11th day of March, 1861, and the 6th day of August, 1870.

3d. A plea of the Statute of Limitations. The property in dispute is a reef of rocks on which the break-water of the defendant is built, which extends up the river from the island just above the falls of the Willamette river, at what is known as Linn City. Which break-water serves to turn water to the locks of the defendant. The evidence tends to show that there is, at ordinary stages of water in the river, a channel between this reef of rocks and the shore, and also a channel between the reef and the island owned by the defendant. This island is owned by defendant, and claimed by it through mesne conveyances from Robert

Moore, the ancestor of the plaintiff, who received the patent from the United States, and consequently both parties claim title from this common source.

The deed to the premises, including this island, does not include this reef of rocks. But the defendant claims that it is appurtenant to the island.

The Circuit Court held that these rocks in the river were appurtenant to the main land, and that riparian rights extend laterally, and not up the river. This view is correct, and according with the opinion of this Court, as expressed in the case of *Minto vs. Delany*, decided at this term, where it was held that the river, and not the meander line, was the boundary of lands lying along the Willamette river; and that accretions formed on the shore, by the gradual receding of the water, belong to the riparian owner. The evidence shows that this reef of rocks was near the shore, and at low water could be approached from the shore, and the riparian owner would have to pass it to reach the main channel of the stream. In all such cases, the lands and rocks along the shore belong to the owner of the adjoining land. Another question in this case arises on that part of the defendant's separate answer, which alleges that defendant is the owner in fee-simple of the undivided one third of one fourth, and W. P. Doland is the owner in fee-simple of the undivided one third of one fourth, and James K. Kelly is the owner in fee-simple of the undivided one third of one fourth of the whole of said premises, being the whole of the interest which the said James M. Moore had in said premises between the 11th day of March, 1861, and the 6th day of August, 1870. It appears from the documentary evidence before the Court, which was used on the trial in the Court below, that Kelly, Doland and D. P. Thompson were the owners in common of three fifteenth of this property, and that before the bringing of this action, Thompson had sold his interest to the defendant, who held the same at the commencement of this action, and that said Kelly and Doland were each still holding one fifteenth. The Court withdrew the evidence of the ownership of Kelly and Doland from the consideration of the jury,

and charged the jury that the plaintiff James M. Moore was entitled to recover of the defendant whatever interest Kelly and Doland held in the land. To this ruling of the Court defendant excepted. The legality of this ruling must be determined by the construction to be given to Section 316 of the Code, where it is provided, "The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or licence or right to the possession shall be set forth with the certainty and particularity required in a complaint." These are all substantive, separate defenses, and if more than one is pleaded, it must be pleaded separately; and a defendant under the Code (Sec. 72) may plead any or all of them in the same answer. It is claimed by counsel for the respondent, that the defendant having pleaded that he was the owner of the entire estate, cannot also plead that he is the owner of an undivided part thereof, and Kelly and Doland owners also; that the two pleas are inconsistent. It is true, that both pleas cannot be literally true, neither is it true in a case of slander, when the defendant alleges that he never spoke the defamatory words, and that the words alleged to be spoken are true; but this is now allowed, and such apparent inconsistent pleading is certainly as proper in defenses to real actions as in cases of mere torts. A defendant may be mistaken as to his legal title, and if that fails, he may maintain his possession by any of the separate defenses named in the statute. It is also claimed, that if these defenses are available, that in order for the defendant to avail itself of it, it must show that it has possession under some lease or license from Kelly and Doland. If the defense that the title and right of possession is in another person, then the plaintiff or defendant is a substantive defense; it can be proved to defeat the right of the plaintiff to recover, who in ejectment must recover on the strength of his own title. And whatever defeats his right to possessinn, defeats the action. It is also further claimed, that the defendant is not in-

jured by this judgment, for defendant is not thereby deprived of his interest in the property. If connected with this action, there was claim for mesne profits the defendant would be liable to pay to the plaintiff the rents and profits of the two fifteenths which belong to Kelly and Doland, and *prima facie* as the judgment now stands, such rents and profits belong to plaintiff as against defendant, for the judgment that he is the owner and entitled to the possession of these two fifteenths, carries with it the rents and profits.

If the defendant was now sued by the plaintiff for these mesne profits, we do not decide whether or not defendant might show, as a positive defense, this estate of Kelly and Doland. Let that be as it may, this judgment establishes the wrong proportion of ownership as between the plaintiff and defendant, and is certainly as much injury to defendant as it would have been had defendant plead ownership of the whole property in another, and been denied by the Court the right to prove it. We think the defendant in this case should have been allowed to prove the alleged ownership of Kelly and Doland, and that the holding and instruction of the Circuit Court to the contrary was error.

The judgment of the Circuit Court is reversed and a new trial ordered.

Supreme Court of Nevada.

OCTOBER TERM, 1878.

MARTENS vs. GILSON.

MORTGAGE—HOMESTEAD—FORECLOSURE—DEFICIENCY—LIEN ON HOMESTEAD.

Where homestead property was sold under a foreclosure of mortgage, and afterward redeemed by the vendee of the mortgagor, the judgment for the deficiency in the foreclosure suit did not create any lien against the real and beneficial estate in the land.

Appeal from the District Court of Ormsby County.

T. W. W. Davies, for Appellant.

R. M. Clarke, for Respondent.

One Bollen, being the owner of certain lands in Douglas County, mortgaged the same to the plaintiff Martens. The mortgage was foreclosed, and Martens became the purchaser of the property for a less sum than was named in the decree of foreclosure, and a judgment in his favor was regularly docketed for the amount of the deficiency. Subsequently Bollen sold and conveyed his equity of redemption to one Johnson, and thereafter Johnson sold and conveyed the same to the defendant Gilson. Within six months after the sale in the foreclosure suit, defendant Gilson redeemed the property by paying to the Sheriff of Douglas County the amount for which the property was sold to the plaintiff, with interests, costs and percentage, as required by law. Two days thereafter the plaintiff Martens caused an execution to be levied under his deficiency judgment, and the property was sold under this execution, and the plaintiff became the purchaser. Having obtained a Sheriff's deed for said property under such sale, he claims to be the owner of the property. At the time of the execution of the mortgage by Bollen and wife to Martens, the property mortgaged was held as a homestead. A declaration of homestead was filed, and no declaration of abandonment was ever executed.

HAWLEY, C. J., in delivering the opinion of the Court, said: Conceding, for the purposes of this decision, that the equity of redemption is the real and beneficial estate in the land, and that it may ordinarily be levied upon and sold under execution (*McMillan vs. Richards*, 9 Cal., 365; *Alexander vs. Greenwood*, 24 Ib., 512; *Trimm vs. Marsh*, 54 N. Y., 599,) yet the fact remains that in this case the property mortgaged was claimed and properly held as a homestead. The mortgage lien against the homestead was satisfied by the sale and redemption of the property under the decree of foreclosure. When the mortgage lien was satisfied the homestead right attached. In such a case the judgment for the deficiency did not create any lien against the real and beneficial estate in the land, because the homestead rights had never been abandoned. The defendant Gilson, by her purchase and redemption, obtained the same rights to which

Bollen was entitled, "She stands in his shoes," and gets whatever estate Bollen had when he sold his right of redemption. (*Gilson vs. Bollen*, 11 Nev., 414.)

Judgment reversed.

United States Circuit Court, D. Indiana.

1878.

BELUN vs. THE WESTERN UNION TELEGRAPH CO.

1. TELEGRAPH COMPANY—SENDING MESSAGE—DUE DISPATCH—JURY. It is the duty of a telegraph company to send a message with reasonable dispatch; but the question of reasonable dispatch is one of fact for the jury, under all the facts and circumstances of the case.
2. *IBID*—DAMAGES—NOTICE. Where there is nothing on the face of the message to inform the company that the plaintiff would sustain loss if it was not promptly forwarded, and the company was not otherwise so informed, it is liable for negligence in nominal damages only.

Action in damages for alleged delay in transmitting a telegram from Monticello to La Fayette, Indiana. The telegram was left by the plaintiff with the messenger at the telegraph office at 11:55 A. M., April 2, 1877, and forwarded by the operator on his return from dinner at 12:45, and delivered at the office of A. O. Belun, to whom it was addressed, at 3 P. M., a few moments too late, as plaintiff claimed, to enable the desired transaction to be closed.

J. R. Coffroth and S. A. Huff, for Plaintiff.

McDonald & Butler, and J. A. Stein, for Defendant.

GRESHAM, J., in his charge, said: "It was the duty of the defendant to send the message with reasonable dispatch. What was a reasonable time for sending a dispatch you will determine from all the facts and circumstances. It is in evidence, and not disputed, that Monticello is a small town where little business was done by the defendant; that the usual line of business between Monticello and La Fayette was through Logansport, where there was a repeating office; that on the other line there was only a single wire, used ex-

clusively for railroad business, with no repeating office at Reynolds. Under the circumstances of this case, one competent operator and a message boy at Monticello was force enough for that office, and it was not negligence in the defendant for the operator to leave the office in charge of the messenger while he was absent a reasonable time at dinner; but whether the absence on this occasion was, or was not, reasonable, is a question for the jury. It was not the duty of the defendant, when the message was left at its office, to forward it to La Fayette as quickly as electricity would carry it. In determining what was a reasonable time, you will take into consideration what has been already said about the necessary force at Monticello, the absence of the operator at dinner, and the further fact that the message had to go through the office at Logansport, and the delays it was liable to encounter there on account of other business.

If, under the instructions already given, you find that the plaintiff has a cause of action, you will next determine the measure of damages. The dispatch, which was not written upon one of the printed forms of the Telegraph Company, reads thus: "Take separate deed to Marks for White, Fountaine, Tippecanoe and Iowa 4, and meet me at office at 9 to-night. (Signed) G. O. Belun." It is not insisted that when the dispatch was left with the operator at Monticello he was informed of the nature of the business to which it related. You will remember that the plaintiff sent the dispatch to the office from the hotel by the boy or young man named Crooks. Was the company informed, by the mere reading of the dispatch, of the nature of the contract between the plaintiff and Reynolds, that the plaintiff had a valuable contract with Reynold, to secure the profits of which it was important the dispatch should be sent to La Fayette promptly and without delay? Unless you think, from the mere reading of the dispatch, the defendant was fairly informed of the nature of the contract between the plaintiff and Reynolds, and that the plaintiff was liable to sustain loss if the same was not promptly forwarded and delivered at La Fayette, the plaintiff is in no event entitled to more than

nominal damages. It would be unjust to the defendant to hold it responsible for damages without limit, when it is not informed by the dispatch itself, or otherwise, that the sender might sustain heavy loss unless the message be transmitted and delivered immediately, or without delay.

If you find that the face of the dispatch informed the defendant of the character of the contract between the plaintiff and Reynolds; if, in fact, there was a contract at all, and that the same was not fraudulent and void; and that there was negligence in forwarding the dispatch to La Fayette; that Reynolds would have complied with the contract on the 2d of April but for the company's negligence, then the plaintiff is entitled to a verdict for the difference between \$300, the contract price, and the fair value of the land bargained for. But if you find there was nothing on the face of the dispatch to inform the company that the plaintiff would sustain loss if it was not promptly forwarded, and yet you find that the company was negligent, then you will find against the defendant for nominal damages only. And, if you find there was no negligence in receiving and transmitting the dispatch, you will find for the defendant.

Verdict and judgment for defendant.

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Current Topics.

By the date of our next issue, all the political parties will have placed their nominees for the Supreme Court Bench before the people. The best interests of the people demand that none but men of unimpeachable character, firmness of purpose and great ability, be placed upon the Bench. Much has been written and said concerning the working of our new judicial system. It is desired that a fair test be made, and if the plan is a failure, amend it as speedily as possible. For its success much depends upon the men who are selected to operate it.

We can hardly believe that the Convention of attorneys, which met last week, to devise means for selecting good men for the office of Superior Judges for this city and county, were in dead earnest when they appointed a committee of fifteen of the leading lawyers of the city to merely interview *every* man placed in nomination, and ascertain if he would accept the office. This seems idle in the extreme. Perhaps more than one hundred names will be handed to the committee, many of them such as ought not to be entertained for a moment, many given in without authority, and many with a view to compliment or a tease. Imagine these gentlemen of talent, ability and absorbing business, trudging about to find the numerous nominees, many of them without a permanent location, perhaps, and it will not be doubted that a greater farce was never seen. It must be presumed that Mr. Wilson meant something else by his resolution. It is reasonable to suppose that the object of the resolution was to ascertain with certainty, before an election should be had, who of the most prominent and learned members of the bar would accept the position. From a list of, say, thirty gentlemen, already distinguished for their ability and integrity, a selection could at once be made which would be acceptable to the whole bar. Members of the bar who would make the best judges might not enter their names, but could be prevailed upon to do so by an argument from so talented a committee. It is to this class of men the committee should wend their way and ask for further time to interview the rest.

ON March 14, 1879, in *Weber vs. W. P. R. R. Co.*, the Secretary of the Interior decided "to constitute a 'valid pre-emption claim,' within the meaning of Section 2 of the act of April 21, 1876, the prior claimant must have possessed the requisite qualifications, and have met the essential requirements of the laws under which he claimed. Failure of a claimant to appeal from the decision of a Register and Receiver is conclusive as to his rights. Mere occupancy of land is not a valid pre-emption claim."

THE following is a syllabus of a recent opinion by Judge DEADY, of the U. S. Circuit Court of Oregon, in the case of *Mickey vs. Willis*: 1. The signatures of the proper officers appearing to an instrument purporting to be the deed of a corporation, the presumption is that such instrument was signed by them by authority of the corporation; and if the seal of the corporation is upon such instrument, that itself is *prima facie* evidence of their authority to sign. 2. Possession is *prima facie* evidence of title, and proof of prior possession is sufficient to maintain ejectment against a mere trespasser. 3. When both parties in ejectment claim title from the same person, neither is at liberty to deny that such person had title. 4. A personal judgment for money or damages in a State Court against an absent defendant who did not appear in the action is so far a nullity. 5. By a valid attachment of property within its jurisdiction, a State Court acquires jurisdiction to give judgment that an absent defendant not otherwise served with process in the proceeding is indebted to the plaintiff therein, and to enforce the payment of the same by the sale of such property. 6. Where the statute authorizes a writ of attachment to be served upon real property by leaving a copy of the same with the occupant thereof, "or if there be no occupant" then "in a conspicuous place" thereon, and it appears from the return that the writ was served by posting a copy on the premises without stating whether they were occupied or not: *Held*, that the service upon the premises was unauthorized and invalid, and that the judgment thereon was a nullity and the sale of the property attached void. 7. *Semble*, that a service of a writ of attachment by leaving a copy of the writ upon the premises, is not good unless it appears that it was posted thereon "in a conspicuous place." Head note to opinion by DEADY, J.

Supreme Court of Oregon.

APRIL 23, 1878.

STARR, RESPONDENT, vs. STARK, APPELLANT.

1. Where one recovers in an action of ejectment the possession of real property; and in the same action recovers a judgment for meane profits for withholding the land, and afterward the defendant in the action of ejectment, brings a suit in equity against the plaintiff, in which it is determined and decreed that the defendant in the action of ejectment was the owner in equity of the land, at and before the commencement of the action of ejectment; and that the plaintiff in the action of ejectment was holding the legal title as the trustee of said defendant, the said defendant in the action of ejectment, may recover of said plaintiff in said action the amount of said judgment for meane profits, and the costs recovered of him in said judgment.
2. A decree of equity affecting property recovered at law, does not operate on the judgment at law, but on the party to the judgment; and the party may be enjoined from pursuing or enjoining such judgment.
3. If such judgment has been executed, a Court of Equity will treat the party holding the proceeds thereof as a trustee in cases where the defendant in the judgment had equitable rights at the time of its rendition, over which the Court at Law had not jurisdiction; and which in a Court of Equity would have prevented such an adjudication as was made in the Court at Law.

Appeal from Multnomah County.

This is a suit in equity, brought by the respondent Starr, against the appellant Stark, for an accounting for rents and profits received by Stark from certain property in Portland, of which Stark is alleged to have held the legal title as trustee of Starr; and for an accounting for certain moneys alleged to have been recovered off of Starr by Stark, by means of which legal title, and in violation of his trust for the detention of such real property by Starr, etc.

Opinion by BOISE, J.

From the statement of the facts, it appears that Starr, being in possession of the lots in controversy, was dispossessed by Stark by action at law maintained by him on his legal

title, which he held by a patent from the United States. In these actions of ejectment, Stark recovered from Starr mesne profits and costs and interest of the same, in one case \$758.45, and in the other \$2,380.77. These sums, with interest, at the date of the decree in the Circuit Court, amounted to the sum of \$5,432.39, and it is from that portion of the decree that the appellants appeal. The other portion, which is for rents and profits received by Stark since he obtained possession under said actions of ejectment. Appellant has paid, and does not contest the right of respondent to it. As appears in the statement of the case, the United States Supreme Court has by a decree in equity, declared that Starr was the equitable owner of these lots at the time of the commencement of said action; and during all the time for which Stark received the rents and profits of the same from Starr, and during that time Starr was entitled to said rents and profits. This decree operates to restrain the operations of these judgments in favor of or for the benefit of Stark, by declaring that he still held the land for the use of Starr, and commanding him to execute the trust by conveying to Starr the legal title. The judgment of the Court, in the ejectment cases only established the legal title in Stark, and did not affect or determine the status of the equitable title at that time. See *Hill vs. Cooper*, 6 Or., p. 181, and authorities there cited.

A Court of Equity does not attempt to act upon a Court at Law itself, and does not claim any supervisory power over such Courts or its judgments; it acts solely on the party to such judgments, and will enjoin him in a proper case from pursuing any claim in a Court at Law over which the Courts of Equity have jurisdiction, either concurrent or exclusive. And where the party has equitable rights not cognizable in a Court of Law, which would in a Court of Equity have prevented such an adjudication as was made in the Court of Law, the judgment will interpose no obstacle to redress in equity, since the Court of Law had no proper jurisdiction of the subject matter forming the basis of redress in equity. (2 Story's Equity of Jurisprudence, Secs. 1570-71-73). In this case it is conceded that the decree of the Supreme Court

of the United States, declaring the respondent to have been the owner in equity, at and before the rendition of the judgment in ejectment against him, renders these judgments inoperative, so far as they affect the title to the land, for the equitable title of Starr, on which the decree is based could not have availed Starr in defending against the legal title in a Court at Law, and these judgments against him are such adjudications as Judge STORY says will interpose no obstacle to redress in equity; since the Court of Law had no proper jurisdiction of the subject matter forming the basis of redress in equity. But it is claimed by the appellant that the judgments for mesne profits, though recovered in the actions of ejectment, are not a part of the judgments for the possession of the land, but separate judgments for damages for withholding the land which is authorized by statute for convenience and to save multiplicity of actions and costs.

It is true, it is a recovery not necessary to a judgment for the possession of the land; yet, the right to such recovery for damages which are simply rents and profits, must depend upon the determination of the right to possession of the land. If the right to recover possession fails to be established by the plaintiff in ejectment, then he cannot recover the mesne profits. And on the other hand, if the plaintiff established his right to possession, and has judgment therefor, he has thereby established his right to the mesne profits, and the defendant in ejectment cannot have any available defense thereto, unless it be that there are none, or that he has paid the same. It must follow as an inevitable conclusion, that if Stark had no just right to the possession of these lots, he had none to the rents and profits which he recovered in these judgments. And that, being at that time the trustee of Starr, whatever rents and profits he did receive, were received for Starr, and should be accounted for. As Starr had no power to interpose his equitable rights to these rents and profits in his answer to the actions of ejectments; these judgments interpose no obstacle to his recovering of them from his trustee who wrongfully withholds them. When a trustee, by virtue of his holding the legal estate, takes the

rents and profits he must account to his *cestui que trust*, and it makes no difference whether he takes from the *cestui que trust*, or a stranger, the question is not how he became possessed of the rents and profits; but whether when he received them they belonged to the *cestui que trust*, and where this relation trust is in controversy with reference to land, or the rents and profits thereof, it can only be settled in a Court of Equity; and when that relation is established in equity, and the Court orders an account by the trustee, it can reach all the trust property, and its issues and interests on the same which has come into the possession of the trustee. It is claimed that in this case, Stark is not a voluntary trustee, and has only been made so by construction of law, and is not therefore liable in the same degree as one who has voluntarily assumed fiduciary relations to his *cestui que trust*. So far as good faith is concerned in Stark's proceedings, it could not affect the rights of Starr to have an account for his property wrongfully withheld, and could only be important in considering whether or not Stark should be called on to pay a sum in addition to the real amount due, and interest by way of damages for the wrongful withholding, and such damages are usually added by charging to the trustee a higher rate of interest, and making costs in the nature of compound interest; and Courts of Equity exercise a large discretion in adjusting the rights of the parties in such cases. (Hill on Trustees, 525.) The amount of the judgments for mesne profits in the actions of ejectment, are the amount of the rents and profits which had accrued to Starr before those actions were brought and wrongfully collected from him, and there can be no question now, since the decree giving the land to Starr, but what he should have the same restored to him, with interest.

It is claimed that whatever may be held as to these mesne profits, that the costs in these actions were not received by Stark to his use, and that the same were not disbursements due or paid to officers and witnesses. These costs and disbursements were such liabilities or actual expenses as Stark was liable for or had been paid in conducting these actions,

and obtaining these judgments. The decree establishes the fact, that these lots were the property of Starr, and it follows that Stark violated his trust in bringing these actions, and he ought not, in justice, compel Starr to pay for this wrong of his.

In equity, more strongly than at law, the maxim prevails, that no man shall take advantage of his own wrong, even at law, if a disseisor alien, the land and descent is cast, and afterward the disseisor acquires the land by descent or purchase, the disseisee may enter. The object of equity is to compensate the *cestui que trust*, and place him in the same situation as if the trusted had faithfully performed his own proper duty. See 2 Story Eq. Jurisprudence, secs. 1264 and 1278.

Stark, when acting in relation to this trust, wrongfully obtained this money from his *cestui que trust*, and if he is allowed to retain it, he will be allowed to profit by his own wrong. It is claimed that the judgments in ejectment are not reversed, but we think, as before stated, that the decree which establishes relations of the parties as trustee and *cestui que trust*, although it does not operate on or annul, the judgment operates on the parties, and thereby suspends the effect of the judgment against Starr, and only serves to show the extent and manner of the wrong of Stark in dealing with the trust property.

The decree of the Court below does not award any damages against Stark; it simply restores to Starr what was wrongfully taken from him with interest, and we think it should be affirmed with costs and disbursements.

United States Circuit Court.

DISTRICT OF OREGON.

WEDNESDAY, MAY 14, 1879.

[No. 510.]

A. L. BANCROFT and HUBERT H. BANCROFT

vs.

W. W. THAYER, Governor; R. P. EARHART, Secretary, and L. J. POWELL, Superintendent. Suit in Equity for injunction.

1. **INJUNCTION.**—A court of equity has power to enjoin the officers of a State from acting under a law which impairs the obligation of a contract made with the State.
2. **POLICE POWER—CONTRACT.**—Unless restrained by its Constitution, a State, in the exercise of its police power, may provide by contract that certain persons shall have exclusive privileges—as that, to supply the common schools of the State with text-books of a specified character and price.
3. **CONTRACT WITH THE STATE.**—An act of the State of Oregon authorized the adoption of text-books for the use of the common schools of the State by a majority of the votes of the County Superintendents, to be canvassed and declared by the Board of Education, and provided that the books so adopted should be exclusively used in such schools for the period of four years thereafter: *Held*, that such act did not constitute a contract with the publishers of the adopted books by which the State was bound to use the same in its schools for said period, nor authorize the Board of Education to make any contract with such publishers on behalf of the State concerning the furnishing and use of said books; but that said act was a mere regulation imposed by the State upon itself, and therefore the legislature might modify or abrogate it at pleasure.
4. **PUBLIC AGENTS.**—A State is not bound by the act of its agents unless they are manifestly acting within the scope of their authority.

DEADY, J.

This suit is brought to enjoin the defendants, constituting the State Board of Education, from taking steps to adopt a new series of text-books for the common schools of this State, under § 12 of the act of October 29, 1872, as amended by § 4 of the act of October 4, 1878 (Ses. L., p. 61), in place of the one now in use, published by the complainants.

The bill states that the complainants are citizens of California, and the defendants of Oregon; that in pursuance of the act of Oct. 29, 1872, aforesaid, entitled, "An act to establish a uniform course of public instruction in the common schools of this State," the Board of Education, among others, adopted six books, published by the complainants, and known as the "Pacific Coast Series," as text-books to be used in the common schools of this State for the period of four years from October 1, 1873, which books were furnished by complainants during said period at fixed prices, in sufficient quantities for said schools; that said Board of Education, in pursuance of said act, again adopted said books for said schools for another period of four years from October 1, 1877; that in November, 1876, and prior to said second adoption, said Board passed a resolution, prescribing "the manner of binding, the mode of printing, and the price to be paid for such series of books as might be adopted by said Board for the said period of four years," and that the complainants, on Nov. 26, 1876, "duly filed with the said Board of Education" their "written obligation," wherein and whereby they undertook and agreed that if said Pacific coast series should be adopted for use in the common schools of Oregon for the said period of four years from October 1, 1877," the complainants "would in all things comply with the demands of said Board as in said resolution set forth;" that thereupon said series of books "was adopted by the said Board of Education in the manner and form by law provided, and became the text-books to be used in the common schools of the State of Oregon" until October 1, 1881; that the complainants are bound to furnish and said schools to receive said books for said period, and complainants have so far complied with said contract and are ready and willing to do so until the expiration of the same; that the complainants, in order to perform said contract, have been obliged to expend large sums of money in the purchase of material and labor for the manufacture of said books and to publish and to keep on hand large quantities of the same, and therefore, if said State Board shall violate or fail to comply with the terms of said contract, the complainants will suffer

great and irreparable loss; that on April 17th, 1879, said Board, in violation of said contract and with intent to disregard it, ordered the defendant Powell to issue a circular to the County Superintendents, directing them to vote upon the adoption of a series of text-books for said schools for the purpose of authorizing other and different books than said Pacific coast series to be used in said schools during the remainder of said period of four years.

Upon reading and filing the bill—April 23—an order was made that the defendants show cause why a provisional injunction should not issue as prayed for, and that in the meantime they be restrained accordingly. The defendants showed cause by demurring to the bill, which on May 6th was argued by counsel.

The demurrer sets up: 1st, This Court has no jurisdiction of the cause. 2d, There is a defect of parties, in this, that the State is not made a party defendant. 3d, The complainants have an adequate remedy at law; and 4th, There is no equity in the bill.

At the argument, upon the decisive authority of *Osborne v. U. S. Bank*, (9 Whea. 738,) wherein it was held that a court of equity may restrain, by injunction, a public officer of a State from acting under a void law of a State to destroy a franchise; and as the State cannot be joined as a defendant, its agent may be sued alone; and that the prohibition to sue a State, contained in the XI amendment to the constitution, does not extend to cases in which a State is not made a party on the record, even if the State has the entire ultimate interest in the subject of the suit—the first and second causes of the demurrer were expressly abandoned, and the third one was not insisted upon.

Under the fourth cause it was maintained by counsel for the defendants: 1st, That the power to regulate the common schools of the State is a part of the police power of the State which cannot be alienated or restrained, even by express grant. 2d, The law did not give the Board of Education, or any one, power to contract with the complainants to furnish school books for the use of the common schools of the State

for any definite length of time, or at all; and, 3d, No such contract appears to have been made

The term "police power of a State" is a convenient and comprehensive expression used to signify those powers by means of which it not only preserves public order and prevents crime, but also promotes and secures good manners in the intercourse between its citizens, and thereby prevents a conflict of rights. 4 Black 162; Cooley, C. L. 572.

The Constitution of Oregon, (Art. 8, § 3,) declares that "the legislative assembly shall provide by law for the establishment of a uniform and general system of common schools." Now, if this be a police power—a mode of preventing crime or promoting good manners—as it probably is, the legislature may exercise it by contracting with any one to furnish books of a prescribed character and cost for the use of said schools for a definite period. To authorize and provide, that by means of contract or legislative grant a particular person or persons shall have the exclusive right to do or furnish a particular thing upon certain conditions for the use and convenience of the public, has always been a common mode of exercising the police powers of the State, and unless the constitution imposes some limitation upon the power of the legislature in this respect, its action is final and binding. (Slaughter house cases, 16 Wall., 66.) As was well said by Mr. Justice MILLER, in delivering the opinion of the Court in the case last cited: "It may be safely affirmed that the parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way."

To say that the legislature cannot barter away the police power of the State, or that one legislature cannot make a law which another one cannot repeal, is simply begging the question. It is not a question as to the comparative powers of different legislatures, but of the *State*. However many legislatures there may be, there is but one State, and it is a continuous being. The legislature is merely a means by which it exercises its powers.

The question is, then, could the *State* as organized make the contract? If it could, good faith requires that it should keep it; and under § 10, of Art. I, of the national Constitution, it *cannot* pass a valid "law impairing the obligation" thereof.

That it would be wise to place some limitations upon the power of the State to bind itself by contract, I admit. But that power is not in the Courts, and can only be exercised by the people in the formation of the organic law.

It is claimed by the complainant that they have a valid, subsisting contract with the State to furnish certain text-books for its common schools, until October 1, 1881, and admitting, for the time being, that the transaction which is alleged to have taken place between the complainants and the State officers amounts in form to a contract to that effect, the question arises, Was any one authorized by the State to make such a contract on its behalf?

The power to contract is claimed to be given to the Board of Education by the Common School Act of October 29, 1872. This act provides in §§ 10, 11 and 12 (Or. Laws, 503) for submitting the question of school books every four years to a vote of the County Superintendents of Schools. The vote is obtained by the Superintendent of Public Instruction, acting under the direction of the Board of Education, sending a circular to each County Superintendent containing a list of the studies required to be taught in the public schools, who "shall, after due consideration, write opposite each study the text-book preferred" by him, and return the circular to the State Superintendent, "who shall cause the same to be laid before the State Board of Education, and the text-book

in any one branch receiving the highest number of votes shall be the authorized text-book in that branch, in the public schools of this State for the four years next succeeding the official announcement of the Superintendent of Public Instruction." Every four years after "the first selection of text-books," the Superintendent shall issue similar circulars for another vote on the question, and unless some new book shall receive a majority of the votes, no change shall be made during the ensuing four years. Section 17 provides that the Board shall have power "to *authorize* a series of text-books to be used in the public schools, in accordance with the provisions of this act." But the Legislature of 1878 amended § 12 aforesaid, so as to empower the Board of Education to order an election for school books at any time when, in its "judgment," any book in use is supplied "at an unreasonable high price, or is found to be excelled by more recent publications in that branch; or for any good and sufficient cause." It is further provided, that any book adopted at such election shall be introduced into all the common schools of the State within six months thereafter. The defendants are proceeding under this amended section to order a new election at once.

These are all the provisions of law on the subject, and it will be seen at a glance that the power of selecting—"adopting"—school books is not in the Board of Education, but the County Superintendents. The only power the Board has in the premises is to call the election for school books, and to canvass the votes and declare the result. The power given them by § 17 aforesaid "to *authorize* a series of text-books" adds nothing to the case in this respect, for they can only exercise such power in the manner suggested, by calling an election by the County Superintendents and declaring the result.

After a careful consideration of the matter, I am unable to find any authority in this legislation for making *any* contract with reference to the supply of school books. The County Superintendents may vote to adopt and the Board must declare the result, and thereby *authorize* the use of the

books elected. But in all this, there is no power to contract and bind the State beyond its power of revocation. Here the power of the officers ends, and the people in the several districts are left to get the books on the best terms they can, or do without them and forfeit their share of the public funds.

A law requiring the Secretary of State to purchase stationery exclusively from the complainants for four years would bind the Secretary, but not the complainants, and of itself would not constitute a contract between the complainants and the State. Nor would a formal agreement entered into between the parties, for the delivery of the stationery and specifying the character and cost of the material, change or enlarge the operation of the law in this respect. Such a law would be nothing more than a regulation which the State imposed upon itself in the person of its Secretary, and which by the agency of its law-making power, the Legislature, it could change or abrogate at pleasure. Such, it seems to me, is the character and effect of this legislation to secure uniformity in school books. The act is not a contract nor a proposal which, being accepted, may become a contract, but a rule for the government of certain officers and people of the State. Neither does it authorize any one to make a contract as a means of carrying its provisions into effect or otherwise. It merely provides for the selection of a series of school books at certain fixed intervals, and commands their use in the district under a penalty. The State is the only party to the transaction, and may therefore modify the regulation at pleasure. An act directly requiring the schools to use the Pacific Coast series for the ensuing four years would not be a contract with the complainants to that effect, nor authorize the Board of Education to make one with them to furnish such books. But the fact that this act provides that the selection shall be made through the intervention of certain officers does not change its character in that respect, and it is still merely a regulation imposed by the State upon itself to the effect, that only certain books shall be used in its schools for a certain period, or until otherwise provided

by the Legislature. It is true, as appears, that the Board of Education, from, as I suppose, a laudable desire to supply the defects and omissions of this crude and incomplete legislation, entered into an arrangement with the complainants at the time of their selection of their books, which, as between individuals, might well be considered a contract, with the view of securing the people of the State a constant supply of the books adopted until October, 1881, of good workmanship, and at a fair and fixed price.

But it is a well settled rule of law, that the State is not bound by the acts of its agents, unless it *manifestly appears* that they were acting within the scope of their authority; and individuals, as well as Courts, must take notice of the nature and extent of the authority conferred by law upon a person acting in an official capacity. "It is thought better that an individual should occasionally suffer from the mistakes of public officers, or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public." *Whiteside vs. United States*, 3 Otto, 257.

There being, then, no valid contract between the complainants and the State by which the latter is bound to use the books of the former in its schools, it follows, of course, that the complainants have no right to the relief demanded, and therefore the prayer for an injunction must be denied, and the bill dismissed.

H. Y. Thompson & George H. Durham for the Complainants.

Joseph N. Dolph for the Defendants.

Supreme Court of the United States.

OCTOBER TERM, 1878.

[No. 193.]

JOHN A. CAMPBELL, DONALD McLANE, ADD WILLIAMS AND THOMAS WILLIAMS, PLAINTIFFS IN ERROR,

VS.

DAVID P. RANKIN.

1. An affidavit for a continuance does not become part of the record, so that the Court can take judicial notice of it on the trial, unless properly introduced as evidence by one of the parties.
2. Possession of land by a plaintiff in trespass *quare clausem fregit* is *prima facie* evidence of title, and is sufficient for a recovery against a mere trespasser.
3. It is the doctrine of this Court that the judgment in a former suit between the same parties is conclusive of every issue decided in that suit; and in the second suit it can be shown by parol evidence what was tried in the first, whenever it becomes necessary to do so.
4. While the local record of a mining community is the best evidence of the rules and customs governing their mining interests, it is not the best or only evidence of priority or extent of actual possession.
5. The act of Congress of May 10, 1872, Section 5, gives no greater effect to the record of such mining claims than is given to the registration laws of the States, and this has never been held to exclude proof of actual possession, and of its extent as *prima facie* evidence of title.

In error to the Supreme Court of the Territory of Montana.

Mr. Justice MILLER delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Montana Territory.

The declaration avers that plaintiffs below, who are also plaintiffs in error, were the owners of a mining claim in Meagher County, known as Claim No. 2, below discovery, in Green Horn Gulch, and that defendant wrongfully entered upon and took possession of a portion of said claim, and took and carried away large quantities of gold-bearing

earth and gold dust, the property of plaintiffs, of the value of \$15,000.

The answer amounts to a general denial of all the averments of the complaint.

Bills of exception taken on the trial show that plaintiffs offered in evidence the record of a judgment in the same Court, in which the defendant in this suit was plaintiff and the present plaintiffs and those under whom they claim were defendants, which was an action for trespass, wherein the same question of conflicting interference of the two mining claims was in issue, and the verdict and judgment were for plaintiffs in this suit. The admission of this record was objected to, and the Court sustained the objection.

Plaintiffs then offered to prove that they had been in actual possession of Claim No. 2, in Green Horn Gulch for several years, and that defendant had admitted in conversation the existence of such a claim, and had conceded a dividing line between his claim and that of plaintiffs, which would give to the latter the ground in controversy. The Court refused this, also.

Plaintiffs then offered in evidence a deed from Harding & Wilson for Claim No. 2, Green Horn Gulch, dated December, 1869, and proof of occupancy and use of it ever since. The Court rejected this, also. And having rejected all the evidence offered by plaintiffs, it directed the jury to find for defendant, and on that verdict rendered a judgment, which was affirmed on appeal by the Supreme Court of the Territory.

The record sufficiently shows that neither party to this suit had any legal title to the *locus in quo* from the United States, and that only such possessory right as the act of Congress recognizes in the locator and occupant of a mining privilege was in controversy.

Since this right of possession was the matter to be decided by the jury, it is almost incomprehensible that proof of prior occupancy, and especially when accompanied by a deed showing color of right, should be rejected.

In actions of ejectment, or trespass on real estate, pos-

session by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. (2 Greenleaf's Evidence, § 311.) If this be the law, when the right of recovery depends on the strict legal title in plaintiff, how much more appropriate is it as evidence of the superior right of possession under the acts of Congress, which respect such possession among miners.

If this plain principle of the common law needed support from adjudged cases, as applicable to the one before us, it may be found in the Courts of California, in *Atwood vs. Fricot*, 17 Cal. R., 43; *Idem.*, 115; *English vs. Johnson*, and *Herr vs. Winder*, 30 Cal. R., 355.

The Court below erred, therefore, in rejecting this evidence of plaintiffs' prior possession.

Whatever may have been the opinion of other Courts, it has been the doctrine of this Court, in regard to suits on contract, ever since the case of the *Steam Packet Co. vs. Sickles*, (24 Howard, —;) and in regard to actions affecting real estate, since *Miles vs. Caldwell*, (2 Wallace, 35,) that whenever the same question has been in issue and tried, and judgment rendered, it is conclusive of the issue so decided in any subsequent suit between the same parties; and, also, that where, from the nature of the pleadings, it would be left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. The latest expression of the doctrine is found in *Cromwell vs. County of Sac.*, 94 U. S. R., 351; *Davis vs. Brown*, *Idem.*, 423.

The rejection of the record of the suit of *Rankin vs. Campbell et al.*, was in direct conflict with this doctrine. In that case Rankin had brought an action of the same character as the one he is now defending, against the parties who are now plaintiffs, and had a verdict and judgment against him. The record in that case, as in this, shows that one party claimed under Mining Claim No. 2, in Green Horn Gulch, and the other under Mining Claim No. 8, in Confederate Gulch. The issue in both cases was to which claim

did the disputed piece of mineral deposit belong, and if that issue was not clear it was competent, under the decisions we have cited, to show by parol proof that the controversy was over the same locality, and that the issue had, therefore, been decided against Rankin.

And this proof the plaintiffs offered, in connection with the record of the former suit. The exclusion of this evidence was error.

The principal ground on which the Court rejected all this evidence, and all other evidence offered by plaintiffs, is, that at the same term of the Court, and before the trial, one of the plaintiffs, in support of an application for a continuance, made an affidavit in which he stated that he expected to prove by an absent witness that he had destroyed the original records and laws of Green Horn Gulch, in which plaintiffs' claim is located; that said records and laws established the size, lines, boundaries and location of Claim No. 2, below discovery, in said gulch, and that said records showed that the predecessors of plaintiffs in interest possessed and occupied this claim, in accordance with the local rules.

This affidavit, made in support of an application for continuance, which was overruled, the judge, of his own motion, treated as part of the record, and as before him on the trial, though not offered by either party; and as well as we can understand it, excluded all other evidence of the possession and location and validity of plaintiffs' claim, because this lost record was the best evidence, and all other was secondary or inferior.

It is difficult to argue this proposition seriously. The affidavit was in no judicial sense before the Court on the trial, and could only be used, if at all, when introduced by one of the parties for some legitimate purpose. If it had been so presented by defendant, it plainly showed that this better evidence was destroyed and could not be produced, and was a sufficient foundation for the use of secondary evidence.

But the local record of a mining community, while it may be, and probably is, the best evidence of the rules and cus-

toms governing the community, and to some extent the distribution of mining rights, is not the best or the only evidence of priority or extent of actual possession. It may fix limits to individual acquisition, the terms and rules for acquiring and transferring mining rights, as the laws of the State do in regard to ordinary property, but such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact.

Whatever may be the effect given to the record of mining claims under Section five of the act of Congress, approved May 10, 1872, (17 U. S. S., 92,) it certainly cannot be greater than that which is given to the registration laws of the States, and they have never been held to exclude parol proof of actual possession, and the extent of that possession as *prima facie* evidence of title.

The Supreme Court of the Territory argue that the trial Court can regulate the order of admission of evidence in a case, and because plaintiffs did not introduce first of all proof of their mining records which were lost, nothing else could be introduced. For want of these, evidence of actual possession, of title-deeds, of the location of the claim, and the record of the former suit determining the rights of the parties to the *locus in quo*, were all unavailing and inadmissible.

We know of no rule of law which justifies this action.

The judgment of the Supreme Court of Montana is reversed, and the cause remanded to that Court with directions to order a new trial.

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NO. 18.

Current Topics.

THE Supreme Court Calendar for the July term has been made up, and will soon be published in pamphlet form by the Clerk.

THE Judicial ticket of the New Constitution Party for the Supreme Bench is as follows: For Chief Justice, Nathaniel Bennett; for Associate Justices, Alexander Campbell, Jr., Caleb Dorsey, J. H. McKune, Calhoun Benham, John C. Burch and Chas. A. Tuttle.

THE following gentlemen were selected by the bar meeting on yesterday as efficient and proper candidates for the Superior Judgships, and their names will be placed before the various nominating conventions for endorsement: O. P. Evans, W. P. Daingerfield, Selden S. Wright, Robt. Y. Hayne, James C. Carey, S. H. Dwinelle, John Hunt, Jr., J. M. Allen, T. W. Freelon, T. K. Wilson, John F. Finn, W. H. Fifield.

THE Secretary of the Interior made a comprehensive ruling in the California case of the Rancho Corte Madera, which is of general application and of very great importance. He holds that under the act of July 1, 1864, but one publication of a survey is authorized, and that all parties failing to appear and file objections to the survey requested by law after such a publication can only be considered as protestants, and are not entitled to appeal from the Commissioner's decision. Secretary Schurz also decides that no parties are entitled to present objections, even within the statutory period of publication, and thus become entitled to consideration as "parties in interest," unless they are claimants under the grant or under an adjoining grant. The effect of this decision will be to break up the practice of interposing claims based on scrip selections, and various other pretenses, by which the final settlement of many Spanish titles in California has been delayed indefinitely from year to year by an unending succession of new objections to confirmation of surveys. The case in hand has been pending on the question of survey alone for nearly twenty years.

Supreme Court of California.

MAY TERM, 1879.

[No. 5,880.]

[Filed June 7, 1879.]

EULOGIO F. DE CELIS, RESPONDENT,

VS.

CHAS. MACLAY *et al.*, APPELLANTS.

Appeal from Seventeenth District Court county of Los Angeles.

Glassell, Chapman & Smith, Attorneys for Respondent.

Brunson, Eastman & Gruves, Attorneys for Appellants.

PER CURIAM.

It is ordered that the judgment entered in this cause be modified, so as to read as follows:

This action having been tried on the 29th day of July, 1877, and the Court having filed its findings of fact and conclusions of law, and ordered judgment for the plaintiff, and having fixed the amount of the attorney's fee at the sum of \$1,442.21—of which sum \$400 has been paid—now on motion of plaintiff's attorney, it is

Adjudged, That there is due on the note and mortgage set out in the complaint the sum of \$36,055.29 gold coin of the government of the United States, principal and interest; and the further sum of \$1,042.21 attorney's fee, and the further sum of \$—— costs of suit, with legal interest on said amounts from the 29th day of July, 1877.

It is further adjudged, that the defendant, Charles Maclay, is personally liable for the payment of said indebtedness.

It is further adjudged, that the mortgaged premises, or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of the sales, the costs of the action, and the indebtedness aforesaid, including said attorney's fees and costs and interest, as provided by law; and it is further ordered and adjudged, that the undivided one fourth of the mortgaged premises, which at the commencement of this action was owned by the

defendant, Charles Maclay, be sold first, and the remaining undivided three fourths thereof be sold only in the event that the proceeds of the first sale are insufficient to pay said indebtedness, costs, attorney's fee, and interest, and it is further ordered, that said sales be made for gold coin of the government of the United States.

It is further adjudged, that the defendants, and all persons claiming under them, be foreclosed of all equity of redemption in and to the mortgaged premises, from and after the delivery of the Sheriff's deed therefore.

It is further adjudged—all parties consenting—that the complaint in intervention of Ferguson, Caswell, Temple, Freeman and Spence be dismissed; and it is also adjudged that the complaint in intervention of Freeman and Spence and Long, assignees of Temple and Workman, be dismissed on the merits.

It is further adjudged—all parties consenting—that of the amount collected on the said mortgage, the Sheriff pay into Court the sum of \$11,977.50, gold coin, with interest thereon from the date of this decree, at the rate of seven per cent. per annum, and that of said sum there be paid by the Clerk to the following parties the following sums, respectively, with interest at said rate, to wit: Alfred Robinson, \$2,500; to William Ferguson, \$2,482.50; to Gaspar Orena, \$4,954.50; to A. R. Chapman, \$179; to Pio Pico, \$1,422; and to William R. Rowland, \$459.50, provided that the amount last mentioned be paid to the said Rowland only in case he redeems the interest of Eulogio F. de Celis, in Section 33 in the San Fernando rancho, heretofore sold under execution at his suit. And that he pay the balance of the amount collected to Josefa Arguello de Celis, administratrix of the estate of Eulogio de Celis, deceased. Provided, always, and it is hereby adjudged, that this judgment shall not be construed as adjudicating the state of the account between defendants Porter and Maclay, or as affecting their relative liabilities to each other in any manner.

The following is a particular description of the mortgaged lands hereby ordered to be sold:

All that certain tract or parcel of land situate, lying and being in the county of Los Angeles, State of California, being all the right, title and interest heretofore belonging to the estate of Eulogio de Celis, deceased, known by the name of ex-Mission of San Fernando, said interest amounting to about fifty-six thousand acres, more or less, and particularly described in a certain deed of conveyance, of even date with the mortgage hereby foreclosed, executed by Eulogio F. de Celis as the administrator of the estate of Eulogio de Celis, deceased, to the said Charles Maclay, to which said deed, and the record thereof, reference is hereby made, saving and reserving from the operation of said mortgage, and of this decree, a tract or parcel of land conveyed by said deed, containing one thousand acres of land, platted and surveyed into town lots, and constituting what is known as the town of San Fernando, as surveyed by W. P. Reynold, surveyor, in May and June, 1874; also reserving two hundred acres lying next adjoining and north of the railroad depot grounds, as described in the deed herein before mentioned.

Order denying the motion for a new trial affirmed.

Ordered that the remittitur issue forthwith.

United States Circuit Court.

DISTRICT OF OREGON.

THURSDAY, JUNE 5, 1879.

[No. 424.]

THE UNITED STATES,

VS.

MARY L. HESS IN PLACE OF JOHN HESS.

1. SEIZURE OF REAL PROPERTY. Unless required by statute, a levy or seizure of real property for the purpose of sale to satisfy a debt or tax may be made without going upon the premises, by making a memorandum upon the warrant of the description of the premises for the purpose of a levy and sale.
2. SALE OF REAL PROPERTY. A deputy collector of internal revenue, to whom a warrant was directed for the collection of a delinquent tax due

from Joseph H., levied upon 330 acres of land belonging to said Joseph H. when said tax became due, by entering upon said warrant a correct description of the premises by metes and bounds, but at the same time incorrectly stated therein, that they were in the occupation of John H., who lived over two miles distant from the premises, and afterward offered the premises upon which said John H. lived for sale upon the erroneous assumption that they were the premises of Joseph H., upon which he had levied as above, and there being no bidders, declared the same purchased for the United States for the amount of the tax, interest thereon and charges: *Held*, that there was no sale of the premises levied upon as the property of Joseph H., and that the United States took nothing by the subsequent conveyance to it from the collector.

Action to recover real property.

DEADY, J.

This action is brought to recover the possession of the south half of the donation of Joseph Hess and Mary L., his wife, situate in Yamhill County, in township 3 south, range 3 west, of the Wallamet meridian, and containing 330 acres. It was brought against John Hess, who answered that he was in possession only as a tenant of his mother, Mary L. Hess, whereupon the latter was made defendant in his place. The cause was heard by the Court without the intervention of a jury.

The complaint alleges that the plaintiff is the owner of the premises, and entitled to the possession of the same. The answer denies these allegations, and sets up that the defendant is the owner of the premises.

The material facts are as follows: On and before June 1, 1868, the premises belonged to Joseph Hess, who, together with his wife Mary L., on October 31, 1868, for the expressed consideration of \$1,000, conveyed the same to their son Tilman C. Hess; and on December 14, 1868, for the expressed consideration of \$500, said Tilman C. and Rachel M., his wife, conveyed the same to said Mary L.

On June 1, 1868, a tax was assessed by the United States against said Joseph Hess, of \$816.67, with a penalty of 5 per centum thereon, amounting in the aggregate to \$857.57, for the occupation of a distiller, and a tax of \$2 per gallon upon 350 gallons of distilled spirits; and payment of the

amount duly demanded of said Joseph Hess prior to January 4, 1871, when a warrant was duly issued to a deputy collector of internal revenue for the collection of said tax, with interest and charges.

By virtue of § 3186 of the R. S., upon the demand and non-payment of this tax it became a lien upon all the property of Hess from the time it was due.

On March 22, 1871, the deputy seized the premises and sold the same at the residence of John Hess, by declaring them purchased for the United States for the amount of said tax, and interest and charges, amounting to \$1,262.66; and on April 20, 1872, the collector of internal revenue duly conveyed the premises to the United States.

This, in brief, is the statement contained in the collector's deed concerning the seizure and sale of the premises, which is made by the law, (§ 3193 R. S.,) "*prima facie* evidence of the facts therein stated."

But upon the trial it appeared from the testimony of the deputy collector and otherwise, that said deputy was never upon the land, nor nearer to it than the residence of John Hess, upon the Wallace donation, which is about 2½ miles from the dwelling-house on the Joseph Hess donation; that said Hess at the date of the assessment of said tax, and for some years prior thereto, lived on the Wallace donation, where he carried on a distillery, and that prior to January 4, 1871, he left the country, and has remained absent ever since; that John Hess, his son, also lived on the Wallace donation, near his father, at this time, and during the proceedings under the warrant lived in the house occupied by his father prior to his departure; that the notice of the seizure and the time and place of sale were given to John Hess; that the only levy or seizure of the premises was made by correctly describing them on the warrant or other memorandum of the levy by metes and bounds, but incorrectly stating therein that they were in the occupation of John Hess, whereas they were, and for some time, had been in the possession of a third person; that this error in the description was carried into the notice of sale, and the deputy

collector, supposing that the distillery was upon the Hess donation, while, in fact, it was upon the Wallace donation, actually sold the latter premises to satisfy the tax against Joseph Hess.

By § 3197 of the R. S. the sale may be made at any place within five miles of the property seized, in the discretion of the officer making the same.

Objection is made to this levy, because the deputy collector did not go upon the land to make it, or in some way signify the fact to the occupant thereof. Under the Code of Oregon, it would not be a good levy. According to its provisions, a levy must be made by leaving with the occupant of the premises, or if there be no occupant, then in a conspicuous place thereon, a copy of the writ. (Or. Civ. Code, § 147, 280.) But there is nothing in the internal revenue acts making the local law in this respect applicable to seizures to enforce the collection of a tax, while in the absence of any statute to the contrary, it seems to be the general rule in the States of this Union that a levy upon, or seizure of, real property for the purposes of sale, may be legally made without going upon the premises, by simply endorsing a description of the premises upon the writ, and stating that they are levied upon for the purpose thereof. (*Callin vs. Jackson*, 8 John., 546; *Armstrong vs. Rickey*, 2 Bank Reg., 475.)

Freeman on Ex., § 280, says: "Judges frequently speak of a levy, and sometimes of a seizure, of real estate under an execution. Notwithstanding this fact, it may well be doubted, whether a levy is essential to a sale; and, if essential, whether any one can confidently state the acts indispensable to its legal existence. * * * * Where there are no statutory provisions governing the officer, a mere entry on the writ, or an advertisement of sale, or making a memorandum descriptive of the premises, intending it for the purpose of levy, is generally regarded as a sufficient levy."

To constitute, then, the seizure authorized by § 3196, of the R. S., it seems only necessary that the officer entrusted

with the execution of the warrant should endorse a description of the premises thereon for the purpose of a levy and sale as required therein, and give notice thereof to the owner as provided in § 3197 of the R. S.

Whether the incorporation of an unnecessary, but erroneous, and probably misleading statement, in the description of the premises—as that they were in the occupation of John Hess, when they were not, and were distant two miles from his residence—vitiated the levy, it is not necessary now to consider.

This sale was made at the house of John Hess, and upon a levy and notice of sale which described the premises as being in his occupation, and was, in fact, a sale of the premises then in the occupation of John Hess, under the misapprehension that they were the premises in controversy—the south half of the Joseph Hess donation. No one attended the sale, or paid any attention to it, and the consequence was, that property, which was worth from \$3,000 to \$5,000, appears to have been purchased by the United States for less than \$1,300.

Upon these facts there was no valid sale of the premises in controversy, and the *prima facie* case made out in the deed to the plaintiff is overthrown by the evidence.

There must be a finding of fact and law for the defendant that she is the owner of the premises, and entitled to the possession of the same.

Rufus Mallory, for the Plaintiff.

Benton Killin, for the Defendant.

Decision of the Secretary of the Interior.

BLODGETT,

vs.

THE CALIFORNIA & OREGON R. R. CO.

The ruling of the Land Department heretofore, to the effect, that the grant to a railroad company takes effect upon lands within the *indemnity* limits at the same time it does upon lands within the *granted* limits, is erroneous.

The right of the company to lieu lands is only a float, and attaches to no specific tracts until the selection is actually made in the manner prescribed.

A pre-emption claim for a tract of land falling within the indemnity limits of a railroad grant, although made subsequent to date of withdrawal, is capable of being perfected should the company fail to select said tract as lieu land upon the adjustment of its road, but such pre-emption claim is incapable of perfection so long as the road remains unadjusted.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, April 7, 1879.

SIR: I have considered the case of *Philip Blogett vs. The California and Oregon Railroad Company*, involving the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 21, and N. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 27, township 33 north, range one west, Shasta, California, on appeal from your decision of April 5, 1877, allowing Blodgett to file a declaratory statement for said tract.

The tract is within the indemnity limits of the grant to the above named railroad company. The road was definitely located opposite the tract in question September 18th, 1867. There may be some question as to the date of withdrawal of the tract above described. It is not material, however, in considering the case before us, to determine whether the withdrawal took effect at the date of the receipt of the letter from your office, dated October 29, 1867, at the local office, which was November 25, 1867, or whether the order took effect at the date of the receipt of the letter written by your office, dated September 25, 1863, at the local office, which date is not given.

It does not appear that the tract in question has been selected by the railroad company, in lieu of land lost in place.

You held that the grant took effect September 13, 1867. On that point, your decision was in accordance with the ruling of the Land Department in force at that time. You also held, that at the time the grant took effect, one Thomas Arthur had a valid pre-emption claim to the tract, which excepted it from the operation of the grant. On this point, I think you erred. The evidence of Mr. Arthur himself shows that he was a citizen of the United States; that he occupied the land from 1863 to the fall of 1869, when he

sold his improvements and abandoned the land; that at the time he occupied the land he was not the owner of 320 acres, and that he never had the benefit of the pre-emption law. There is no evidence to show that he did not leave land of his own to settle upon the tract in question, neither is there any proof that he ever claimed said tract as a pre-emptor, nor that he intended to assert a pre-emption claim to the same. He was a mere occupant of the land, which he abandoned when it was for his interest to do so, and he in no sense possessed a valid pre-emption claim to the tract at the date of withdrawal, nor at the time the road was definitely located.

Other important questions, however, arise in the consideration of this case. It has been for many years the ruling of the Land Department, that the grant to a railroad company takes effect upon lands within the indemnity limits at the same time it does upon lands within the granted limits.

In the recent case of *Michael Ryan vs. The Central Pacific Railroad Company*, the Supreme Court of the United States, after quoting the granting act, says, "Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. with respect to the 'lien lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed. * * * * "It was within the secondary or indemnity territory where the deficiency was to be supplied. The railroad company had not, and could not have, any claim to it until specially selected, as it was for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements." The tract in controversy before the Court, and the tract under consideration in the present case, were both claimed under the provisions of the same granting act, and in view of the decision of the Court, it must be held that the grant will not operate upon the latter tract of land until the same has been selected in the manner provided by law in satisfaction of land lost in place. The

evidence shows that Blodgett, the present applicant, settled upon the land in 1871, and he claims the land under the provision of the pre-emption law. Was the land subject to pre-emption settlement at that time?

In the second section of the act of Congress, approved July 25, 1866, after designating the grant in place, and providing for the indemnity limits, it is expressly provided, that "as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located, and within the limits before specified."

In accordance with the provisions of this statute, the land in question was withdrawn by the officers of the Land Department from sale or pre-emption settlement long prior to the settlement of Blodgett, whether we consider the tract withdrawn by the letter from your office, dated October 29, 1867, or September 25, 1868, hence the present occupant of the land could not initiate a pre-emption claim in 1871, neither can he obtain relief under the second section of the act of April 21, 1876, as the claim of Arthur was not a valid pre-emption claim at the date of withdrawal, neither has the entry of Blodgett been allowed under the ruling of the Land Department, hence it does not come within the provisions of the confirmatory statute.

Should the tract in question not be required in satisfaction of land lost in place, I see no reason why the claim of Blodgett may not be perfected, upon showing a full compliance with the law; this, however, cannot be done while the grant to the company remains unadjusted.

Your decision is reversed, and the papers in the case are herewith returned.

C. SCHURZ.

To the Commissioner of the General Land Office.

New York Court of Appeals.

MARCH 18, 1879.

LIABILITY OF RAILROAD COMPANY FOR ACTS OF PERSONS IN CHARGE
OF DRAWING-ROOM CARS.

THROPE vs. N. Y. C. & H H. R. R. Co., APPELLANT.

The persons in charge of drawing-room and sleeping cars, in a train, are to be regarded and treated, in respect of their dealings with passengers as the servants of the railroad company, and the latter is responsible for their acts to the same extent, as if they were directly employed by the company, notwithstanding the fact, that such drawing-room and sleeping cars are owned, and such persons employed by another.

A passenger, on defendant's railroad, passed through two ordinary cars attached to the train, but found no vacant seat; there were a few seats occupied, each by one person and his baggage, but there were several persons standing for want of seats. He thereupon passed into a drawing-room car attached to the train, and took a seat. When called upon by the porter for the extra sum demanded for riding in that car, he declined to pay, for the reason that he could find no seat elsewhere, but expressed his willingness to leave the car whenever he could get a seat in the other cars. The porter, thereupon, attempted to eject him, and for such assault, this action was brought against the railroad company. The drawing-room car was owned and the porter was employed by Wagner, he paying the company a certain part of his receipts for hauling his drawing-room cars. *Held*, (1) that the defendant was liable for the act of the porter, to the same extent as for an act of its own servants; (2) that the plaintiff was not bound, under the circumstances, to apply to the conductor for a seat before entering the drawing-room car.

Appeal from a judgment of the General Term of the Third Department, affirming a judgment entered on a verdict in favor of the plaintiff. The case is reported below, (13 Hun., 70.) The opinion states the facts.

ANDREWS, J.

The defendant's counsel, upon the conclusion of the evidence moved for a nonsuit, on the ground, that it appeared from the proof presented the porter by whom the al-

leged assault was committed was not the servant of the defendant; and that the defendant was not, therefore, responsible for his acts.

The plaintiff was a passenger on the defendant's train. He entered the cars at Syracuse, with the intention of riding in one of the ordinary cars to Auburn. He passed through the two ordinary cars attached to the train, and finding no vacant seat, passed into the drawing-room car, and when called upon by the porter to pay the extra charge for a seat in that car, declined to pay the sum demanded, for the reason that he could find no seat elsewhere, but expressed a willingness to leave the car whenever he could get a seat in the other cars. The porter thereupon attempted to eject the plaintiff from the car, and for this assault the action is brought.

The proof shows that all the seats in the two ordinary cars were occupied, and that several persons were compelled to stand in the passage-way, and others were seated on the wood box, for want of other accommodation. The ground upon which the motion for nonsuit was made, assumes that under the circumstances the plaintiff was justified in going into the drawing-room car, and that the act of the porter, in attempting to eject him, was an unjustifiable assault, but the claim is made, and the exception to the refusal to nonsuit is sought to be supported, on the ground, that the porter was the servant of Wagner, the owner of the drawing-room car, and was not in fact or law the servant of the defendant.

If the right of the plaintiff to maintain this action depends upon the existence of the conventional relation of the master and servant, between the defendant and the porter at the time of the transaction in question, the action cannot be maintained.

The porter was, in fact, the servant of Wagner. Wagner employed him, paid him, and could at any time discharge him. His duty was to take charge of the drawing-room car on the train, assign seats to passengers desiring seats therein, and collect and receive the sums charged therefor. He was instructed by Wagner to remove from the car persons who refused to pay extra fare, and looking at the contract of

employment only, he was, in attempting to remove the plaintiff, acting as Wagner's servant.

The general principle is well settled, that to make one person responsible for the negligent or tortious act of another, the relation of principle and agent, or master and servant, must be shown to have existed at the time, and in respect to the transaction between the wrong-doer and the person sought to be charged. Upon this relation the doctrine of *respondet superior* rests. (*Laugher vs. Pointer*, 5 B. & C. 547; *Blake vs. Ferris*, 1 Seld. 48.) The defendant relies upon the absence of this relation between the porter and the company as conclusive against its liability for his act. But we are of opinion that this defense is not available to the defendant, or rather that the persons in charge of the drawing-room car, are to be regarded and treated in respect of their dealings with passengers, as the servants of the defendant, and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company.

The contract between the company and Wagner was proved. By this contract Wagner agrees, at his own cost, to place upon the defendant's road as many drawing-room cars as should be required for the accommodation of the defendant's traffic, and to do certain specified repairs, and provide conductors and porters, who were to have charge of the distribution of compartments and seats therein, free from interference by the conductor of the train. The train conductors, by the terms of the agreement, are entitled at all times to enter the cars for the purpose of collecting fares of passengers, or for any purpose connected with the management of the train, and it is made the duty of the conductors and porters of the drawing-room cars to assist the train conductors in enforcing the order and discipline of the road. The contract provides for a monthly accounting by Wagner to the defendant of the receipts and earnings of the business, and the payment by him to the defendant of twenty per cent. of the gross earnings, after deducting license fees paid for any patented inventions used in the cars, which payment is expressed to be in consideration of the service performed

by the defendant in hauling the cars, furnishing fuel and lights therefor, and repairing the trucks, brakes and exterior of the cars, as provided in the agreement. The agreement reserves to the defendant the right to determine the location of the drawing-room cars in its trains.

The business of running drawing-room cars in connection with ordinary passenger cars has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare, for the special accommodation afforded by them. They are put on, presumably, in the interest of the road. They form a part of the train; and the manner of conducting the business is an invitation by the company to the public to use them, upon the condition of paying the extra compensation charged. Passengers cannot know what private or special arrangement, if any, exists between the company and third persons, under which this part of the business is conducted; and they have, we think, in taking one of these cars, a right to assume that they are there under a contract with the company, and that the servants in charge of the drawing-room cars are its servants. Otherwise, there would be two separate contracts in the case of each passenger in these cars, one with the company, and one with Wagner. Such a condition of things would involve a confusion of rights and obligations, and divide a responsibility which ought to be single and definite. Take the case of a passenger in a drawing-room car who should be burned by the negligent upsetting or breaking of a lamp by the porter; or the case of a passenger in a sleeping car, injured by the negligence of a porter, allowing a shelf to fall upon the passenger. Is the passenger, in these or other similar cases which might be supposed, to be turned over, for his remedy against Wagner, on the ground, that the servant who caused the injury was his servant, and not the defendant's? The public interests and due protection to the rights of passengers, require that the railroad company which is exercising the franchise of operating the road for the carriage of passengers, should be charged with, and respon-

sible for the management of the train; and that all persons employed thereon should, as to passengers, be deemed to be the servants of the corporation.

The statute for the incorporation of railroad companies contains various provisions regulating the manner in which the discipline of the train, and the rights of the companies against passengers are to be enforced, and they assume, that the servants employed on the train, are the servants of the company. The 30th section (Laws of 1850, chap. 140,) requires that all servants of the corporation employed on a passenger train shall wear a badge, which shall indicate his office; and prohibits any officer or servant, without such badge, from meddling or interfering with any passenger, his baggage or property. The 36th section authorizes the conductors or servants of the corporation to put passengers off the cars who shall refuse to pay their fare. These sections imply that the persons charged with the duty of enforcing the discipline of the train are the servants of the corporation. The servants employed in the Wagner car are, by the contract between him and the defendant, required to assist the train conductors in enforcing the discipline of the road.

It is not contended, indeed the inference from the evidence is clear, that the practice is for the conductor and porter of the drawing-room cars to enforce the regulations under which passengers are permitted to use them, and that they act, in so doing, with the knowledge of the defendant. Their acts, in the execution of this duty, upon every reason of policy and propriety, should be deemed to be the acts of the company.

The Legislature, in 1853, authorized sleeping cars to be put upon a railroad by a patentee, with the consent of the company, and an extra charge to be made to passengers using them; but the act carefully provides that it should not be construed to exonerate the company from the payment of damages for injuries, in the same way and to the same extent as if the cars were owned and provided by the company. Laws of 1858, chap. 125.

We are of opinion that the claim of immunity from responsibility for the acts of the porter, urged on behalf of the

defendant, cannot and ought not to be allowed, and that the motion for nonsuit was, therefore, properly overruled.

A single additional question remains to be considered. The defendant's counsel requested the Court to charge the jury that if the plaintiff, when he passed through the cars, saw that seats were occupied with luggage, it was his duty, when he met the conductor, to ask him for a seat, before passing into the drawing-room car. The Court declined to so charge, and the defendant's counsel excepted.

We are of opinion that, in view of the facts in the case, the request was properly refused.

There is some evidence tending to show that one or more of the seats in the ordinary cars were occupied by one person with his luggage, but it does not appear that if the luggage from the seats so occupied had been removed there would have been sufficient seats for the passengers standing in the passage way when the plaintiff passed through the cars. The inference from the evidence is that there would not have been. Under these circumstances the plaintiff cannot be deemed a wrong-doer in passing into the drawing-room car and taking a seat, until seats in the other cars be vacated. It was the duty of the defendant to furnish him a seat. His omission to speak to the conductor and ask for a seat, when he first met him, may reasonably be accounted for on the ground that he supposed that such a request, at that time, would be unavailing. So far as appears, there was no regulation—at least none known to the plaintiff—prohibiting a passenger not intending to ride in a drawing-room car from entering it for a temporary purpose, under circumstances such as existed in this case.

If the plaintiff was mistaken as to the rules, his mistake did not convert him into a trespasser, and on the first opportunity after entering the car, he informed the servant in charge that he would leave the car as soon as a seat in the other car was provided. See *Willis vs. Long Island R. R. Co.*, 34 N. Y., 670.

We think there was no error committed on the trial, and the judgment should, therefore, be affirmed.

All concur, except RAPALLO, J., not voting.

Recent Decisions.

CONSTITUTIONAL LAW.

Impairing the Obligations of Contracts.—The character of the Bank of Tennessee declared that its notes should be receivable in payment of taxes. The Legislature declared the issue made during the rebellion void, and forbade their receipt for taxes. *Held*, such a law is unconstitutional. (*Keith vs. Clark*, U. S. Sup. Ct., Va. L. J., Jan., p. 8; Rep., Jan. 29, p. 129.)

Limitations—State Statute Inapplicable to Federal Government.—A State cannot pass a Statute of Limitations applicable to the United States. (*United States vs. Thompson*, U. S. Sup. Ct., Alb. L. J., March 1, p. 174.)

Police Power—Liquor Traffic.—A law making the owner of premises wherever liquor is sold liable for all damages consequent upon the intoxication of persons purchasing it, without reference to the negligence of the owner, or the lawfulness or unlawfulness of his tenant's action, is a valid and constitutional exercise of the police power. (*Berthoef vs. O'Rielly*, Ct. App. N. Y., Am. L. Reg., Feb., p. 111.)

Police Power of the States—Patented Article.—A State, in the exercise of the police power, may prohibit the sale of illuminating oils below a certain prescribed standard, notwithstanding the oil is manufactured under a patented process. (*Patterson vs. The Commonwealth*, U. S. Sup. Ct., Ch. Leg. N., Feb. 22, p. 183.)

Polygamy—United States Statutes.—The law prohibiting polygamy in the Territories of the United States is constitutional. A violator is not excused because he believes the law is wrong upon religious convictions. (*Reynolds vs. United States*, U. S. Sup. Ct., Alb. L. J., Feb. 1, p. 92; Rep., Feb. 5, p. 161; Cal. Leg. Rec., Jan. 11, p. 173; Int. Rev. Rec., Feb. 10, p. 40; Int. Rev. Rec., Feb. 17, p. 50; Wash. L. Rep., Jan. 3, p. 19.)

School-houses—Religious Worship.—The use of public-

school buildings for religious meetings is not in conflict with the Iowa Constitution, providing that no law shall be passed respecting the establishment of religion, and that no person shall be taxed for building or repairing places of worship. (*Davis vs. Boget*, Sup. Ct. Iowa, West. Jur., March, p. 104.)

OREGON SUPREME COURT ABSTRACT.

Specific Performance—Possession—A Court of Equity will not be justified in decreeing the specific performance of a parol contract for the sale of land unless such contract is explicit in its terms; nor unless the boundaries of the land are already defined. Where possession is relied on as an act or part performance of a parol contract, in order to take the case out of the operation of the statute requiring contracts in relation to the sale of lands to be in writing, such possession must be visible, notorious and exclusive on the part of the vendee, and must have been taken under and in pursuance of the parol agreement. Decree of the Court below reversed and complaint dismissed. (*Brown vs. Lord*,) Opinion by KELLY, C. J.

Witness—Impeachment of Character—Slander.—A statute provided that a witness may be impeached by contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts. *Held*, that a party being a witness in her own behalf, cannot be impeached by a letter written by her to another person, containing language which would indicate she was unchaste. The moral character of a witness cannot be impeached by showing particular act of immoral conduct. In an action for slander it is proper for the Court to charge that they could consider the acts and manner of the defendant at the time of speaking the words complained of, both on the question of malice and as to the amount of damages. That the manner and acts of defendant, at the time of speaking the words complained of, may be considered to explain the words. (*Leverich vs. Frank*.) Opinion by BOISE, J.

PROMISSORY NOTE.

Presentment for Payment—Where to be Made—Pleading.—Where the drawee of a note has his home or domestic establishment in one town and his place of business is in another town, a presentment made at either place will be good. So if the drawee has his dwelling-house or home in one part of the same town, and his place of business in another part, a presentment may be made at either at the option of the holder. In an action against the endorser of a promissory note it is sufficient if the complaint alleges in general words "that payment of the note was duly demanded at maturity," without any further statement as to time or place of demand or of the person of whom such payment was demanded. (Story on Bills of Exch., § 236; *Shed vs. Brett and Trustees*, 1 Pick., 413; *Williams vs. Bank of the United States*, 2 Pet., 96; *Ogden vs. Cowley*, 2 Johns., 274, Wisconsin Sup. Ct., April 22, 1879; *Wallace vs. Crilley*.) Opinion by TAYLOR, J.

NOTICE OF PROTEST.

Waiver of Agreement by Endorser to take up Note.—If, by a prior arrangement between the parties to a bill or note, the necessity of notice has been expressly or impliedly dispensed with as between these parties, no notice need be given and the want of it is entirely excused. When an arrangement with the maker is entered into by an indorser by which he was to take up the note, it is a sufficient waiver of notice of non-payment. (*Marshall vs. Mitchell*, 35 Me., 221, Wisconsin Sup. Ct., April 22, 1879; *Hale vs. Danforth*.) Opinion by ORTON, J.

Pacific Coast Law Journal.

VOL. 3.

JULY 5, 1879.

NO. 19.

Current Topics.

SAYS the *Albany Law Journal*: "It is certainly important for the citizen to know whether he is bound, at the call of a policeman, to aid him in arresting a criminal. But it seems that authorities differ on the point. A man having been convicted at the Clerkenwell London Police Court for declining to help a policeman in apprehending two persons charged with theft, a British citizen writes in high dudgeon about it to a daily newspaper, and 'wants to know' how this differs from 'conscription.' Whereupon the *Law Times* laughs at the indignant citizen, telling him that 'the knowledge of the existence of such duties is almost universal in the country for the existence of whose liberties he is so laudably anxious,' and referring him to *Reg. vs. Sanders*, (L. R., 1 C. C., 75;) which, by the way, does not seem to be at all in point. On the other hand, the *Law Journal*, while it does not exactly deny the legal duty in question, 'wants to know' how to solve the practical dilemma following, namely:

" 'Is it worse to be hustled by a police constable, dragged to the station house, brought up before a magistrate, and fined 40s. for 'not moving on' and for hindering the police in the execution of their duty; or to save your body from injury, and to be convicted and fined 40s., at Middlesex Sessions, for not aiding a police constable in arresting a criminal? This is now the alternative presented to passengers in the streets of the metropolis.' "

And the *Journal* intimates that it is the part of discretion to escape the personal injury, so long as the cost is the same in either event. Our legal brethren have a great deal of trouble on the other side. How much better to emigrate to this favored land where Courts and policemen always do their exact duty.

Supreme Court of the United States.

OCTOBER TERM, 1878.

[No. 177.]

TOWN OF BROOKLYN vs. ÆTNA LIFE INS. CO.

MUNICIPAL BONDS—BONA FIDE PURCHASER.

A purchaser of municipal bonds is bound to take notice of the provisions of the statute under which the bonds were issued, but is under no legal obligation to inquire as to the precise form or terms of the subscription, whether it was absolute or conditional.

A decree in a proceeding wholly *in personam* cannot bind one not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds proceeded against by constructive service.

HARLAN, J., delivered the opinion of the Court.

This action is upon certain interest coupons issued in the name of the town of Brooklyn, Illinois. Besides the general issue, the town filed four special pleas.

The second plea, in substance, avers that the coupons in suit, and the bonds to which they were attached, were issued and delivered by the Supervisor and Town Clerk of the town for stock claimed to have been subscribed to the Chicago and Rock River Railroad Company, an Illinois corporation, organized under an act approved March 24, 1869, and thereby authorized and empowered to locate, construct and complete a railroad, from a point on the south side of Rock river, near Sterling, via Amboy, crossing the Chicago and Burlington Railroad, thence to intersect the Chicago branch of the Illinois Central Railroad, outside of the corporation at Chicago; that the railroad company, in order to induce the town to subscribe to its capital stock, by its officers and agents, pretended to lay out the line of railroad through the town and near the village of Maluguis Grove, thence to its terminus on the Chicago branch of the Illinois Central Railroad, and gave out that it was about to construct and complete its road, and thereby establish a through line to Chicago,

wholly independent of and a competing line with the Chicago, Burlington and Quincy Railroad, which passes a few miles south of Brooklyn; that on 20th September, 1869, an election was held to determine whether the town should subscribe \$50,000 to the stock of the company; that the notices for the election expressly stated that no bonds in payment of any subscription should be issued, or draw interest, or be delivered to the railroad company, until the railroad was completed and cars running through Brooklyn; that a majority of the voters at such election voted to make the subscription; that on 23d May, 1870, Wm. Holdren, the acting Supervisor of the town, as such supervisor, signed and executed a certain paper, purporting to subscribe \$50,000 in the name of the town to the capital stock of the company, which subscription provided that it was made upon the express understanding set forth in the notices of election, and that no payment was to be made until the road was completed and the cars running through the town; that the supervisor of the town had no authority or power to issue any bonds or coupons to said company until the road was completed, which has never been done; that just before the issuing of the bonds and coupons, it was rumored in the town that the railroad was about to be transferred to the Chicago, Burlington and Quincy Railroad Company, and was not to be built and completed as required by the notices of election and the terms of subscription; that thereupon the agents and representatives of the Chicago and Rock River Railroad Company were notified that if the road was not to be built and completed as promised, the bonds and coupons would not be issued and delivered; whereupon said agents and representatives informed the town and the citizens thereof that the company intended to complete the railroad as promised, and as fast as men and money could do so; that thereupon the Supervisor and Town Clerk, relying upon such representations, but having no power or authority so to do, did, on about November 7, 1872, sign, issue and deliver in the name of the town, to the agents and representatives of the company, bonds to the aggregate amount of \$50,000,

with coupons attached, part of which are those sued on; that as soon as the bonds and coupons were received by the company it utterly ceased and refused to prosecute the construction of the road, and abandoned the entire work; whereby the town failed to obtain any railroad to Chicago, or a competing road with that of the Chicago, Burlington and Quincy Railroad; that the representations aforesaid of the company's agents were knowingly false and fraudulent, but their falsity was unknown to the town, its supervisor and clerk when the bonds were issued and delivered, and the issuing and delivery were procured by such false and fraudulent representations; that the bonds and coupons are wholly void and in no wise obligatory upon the town, because the company had not at the time they were issued complied with the conditions prescribed by the election notices and the subscription; that the town claims no interest in the stock of the company, which is worthless, and has been ever since the work was abandoned, and has received no value whatever for the bonds and coupons.

The third plea avers, that the insurance company "is not a *bona fide* assignee of the interest coupons declared upon in said declarations before maturity and without notice of the defenses set up in the second plea."

The fourth plea avers, that the bonds and coupons "were issued by the Supervisor and Town Clerk of said town of Brooklyn, and delivered without the authority of the Board of Auditors or the corporate authorities of said town; and the Supervisor of said town who issued and delivered the same, acted therein fraudulently and in collusion with the parties to whom the same were delivered, the said Supervisor knowing at the time he had no such authority, and he having been elected Supervisor on the express pledge on his part, and with the understanding between him and those who voted for and supported him, that he would not issue and deliver said bonds and coupons until said Chicago and Rock River Railroad was completed its entire length to the Chicago branch of the Illinois Central Railroad."

The fifth plea avers, that by a decree of the Circuit Court

of Lee County, Illinois, rendered November 14, 1873, in the action of the town of Brooklyn and others, against the Chicago and Rock River Railroad Company and others, "it was ordered, adjudged and decreed, that the said pretended bonds and coupons of the said town of Brooklyn, so issued to the said Chicago and Rock River Railroad Company, and registered as aforesaid in the office of the Auditor of Public Accounts of Illinois, are void and in no wise obligatory on the said town of Brooklyn, and that the same be surrendered up by the parties holding the same to be canceled," which decree it is averred is in full force and effect; that the said insurance company was made defendant in such suit, with the other holders and owners of the bonds and coupons issued by the town, by the name and description of "the unknown owners of certain bonds and coupons issued by Washington J. Griffin, the Supervisor of the town of Brooklyn, Lee County, Illinois, to the Chicago and Rock River Railroad Company, purporting to be the bonds and coupons of said town of Brooklyn;" that said Circuit Court of Lee County had then and there jurisdiction of the subject-matter and the persons or parties defendant therein, by the issuing and return of process, and by proof of publication made as required by the statute of the State of Illinois, in case of non-resident defendants.

To the plea of the general issue, a joinder was filed, and to the third plea a replication was filed, averring that the insurance company became a *bona fide* assignee of the coupons declared upon before maturity, and for value, without notice of the defenses set forth. To the second, fourth and fifth pleas, there was a general demurrer.

Upon the calling of the case for trial, the plaintiff moved the Court, (quoting from the order,) "that a jury come to try the issue joined upon the plea herein. It is thereupon considered by the Court that a jury came to try said issue, and thereupon came a jury, etc., * * * who were * * * sworn, well and truly to try said issue, and after, etc., * * * returned into Court the following verdict, to wit: 'We, the jury, find the issue for the plaintiff, and assess its damages to the sum of \$5,511.' It is, therefore, considered," etc.

Upon a subsequent day of the term, the city, by its attorney, moved the Court to set aside the judgment and grant a new trial, but filed no grounds therefor in writing. Subsequently, the city failing to appear and sustain its motion for a new trial, the same was overruled.

The errors assigned are: 1st. That the Court sustained demurrers to the 2d, 4th and 5th pleas.

2d. That the Court erred in rendering judgment on the verdict of the jury.

OPINION.

The questions presented for consideration upon this writ of error seem to have been concluded by the former decisions of this Court.

1. The facts set out in the second plea do not constitute a defense to this action. It is not averred in that plea, that the insurance company had, at the time it purchased the coupons in suit any knowledge or actual notice of the special conditions embodied in the election notice and repeated in the formal subscription of May 23, 1870. Nor is it therein alleged that the bonds, to which these coupons were originally attached, contained recitals indicating that the subscription had been voted and made upon any conditions whatever. The defendant in error was undoubtedly bound to take notice of the provisions of the statute under which the bonds were issued. But it was under no legal obligation to inquire as to the precise form or terms of the subscription, whether it was absolute or only conditional.

Had the insurance company, before consummating its purchase of the coupons, examined the act incorporating the Chicago and Rock River Railroad Company, it would have ascertained: 1st. That the statute made no provision for conditional subscriptions. 2d. That upon the approval by a majority of the legal voters of any incorporated city, town or township, along or near the route of the road, at an election called and held for such purpose, in the mode prescribed by law, it was made, by the express words of the statute, the duty of the President of the Board of Trustees, or other executive officer of such town, and of the Supervisor of such township, to make the subscription voted for, receive cer-

tificates therefor, and execute to the company bonds of the required amount, bearing interest, payable annually, and signed by such president, executive officer or supervisor, and attested by the Clerk of the municipality, in whose name the bonds were issued. 3d. That, within ten days after the approval of a subscription by popular vote, it was the duty of the Clerk to transmit to the County Clerk a statement of the vote given, the amount voted, and the rate of interest to be paid; and, within like period, after bonds were issued, to file with the County Clerk a certificate showing the amount and number of bonds issued, and the rate of interest to be paid. If it be suggested that the statement thus directed to be transmitted to and filed with the County Clerk would inform the purchaser whether the subscription was conditional or absolute, a sufficient response is, that such statement might have been in conformity with the letter of the statute, without setting forth the precise nature of the subscription. But a conclusive answer is, that there is no averment that any such statement was prepared, transmitted or filed, or if filed, that it indicated the conditional nature of the subscription, by reference either to the election notice, or to the formal subscription of May 27, 1870.

The plea shows that "the town and the citizens," (to adopt the language of the plea) were assured by the agents and representatives of the railroad company that the latter intended, in good faith, to perform the special conditions annexed to the subscription, and that all rumors to the contrary were without just foundation. These assurances were credited, and, in reliance upon them, the Supervisor and Clerk executed and delivered the bonds, knowing, at the time, that the conditions imposed by popular vote, as well as by the terms of the subscription, had not been complied with. Thus was faith in the promises of a railroad company substituted for a contract which, had the town stood upon it, would either have secured the construction of the road, as contemplated, or guarded its people against a burden which has been imposed upon them through the fraudulent conduct of railroad officials, and the violation, by its own officers, of the trust committed to them. By the act of the town's con-

stituted authorities, who, by the statute, had the right, under certain circumstances, to execute and deliver the bonds and coupons, the railroad company was enabled to put them upon the money market in advance of the construction of the road. It is now too late for the town to claim exemption, as against *bona fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice either from the statute or otherwise. The remedy of the city is against the railroad company, and its own unfaithful officers, who, it is alleged, were in fraudulent combination with the company.

2. For the reasons already stated, the fourth plea must be held to be insufficient. The bonds were signed by the officers designated for that purpose by the charter of the railroad company, and, after the vote and subscription, it does not seem to have been necessary that the Board of Auditors or other corporate authorities of the town should have participated in their issue and delivery.

3. The fifth plea is radically defective. The suit commenced and determined in the Circuit Court of Lee County, was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons, which had been issued in the name of the town, and delivered to the railroad company. Upon principle and authority, no decree therein rendered could bind any one not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever: *Pennoyer vs. Neff*, (95 U. S., 714,) and authorities there cited.

4. We come now to consider the only remaining assignment of error which need be considered, viz.: that the Court erred in rendering judgment upon the verdict. This objection rests upon the ground that although there were two issues to try—those arising under the first and third pleas—the jury were sworn to try “the issue,” and found only “the issue” for the defendant in error.

We observe, from the record, that after the demurrer to to the second, fourth and fifth pleas was sustained, the city failed to appear, by attorney, at the trial before the jury. After verdict, a motion was entered to set aside the verdict, and judgment, and grant a new trial. But no written grounds were filed in support of the motion. Nor did the city appear at the hearing of the motion, and urge any reason for its being granted. It was, consequently, denied, and, in this Court for the first time, specific objection is made that the jury were sworn to try, and, in fact, tried but one issue, and that it is impossible from the orders of the Court to say what issue was tried. We decline to consider the objection. If the attention of the Court below had been called to this matter, the objection might have been obviated. There is no bill of exceptions showing to what point the evidence was directed, and we will assume under the circumstances of the case, that all the issues were tried which were presented in due form for trial, or which the parties desired to be disposed of. *Laber vs. Cooper*, (7 Wal., 565.)

Our conclusion is, that no error was committed in the Court below, and the judgment is, therefore, affirmed.

United States Circuit Court.

DISTRICT OF OREGON.

TUESDAY, JUNE 24, 1879.

In re J. L. SCOGGIN. IN BANKRUPTCY. OBJECTIONS TO PROOF OF DEBT.

- (1) **ATTORNEY'S LIEN.**—Under § 1012 of the Or. Civ. Code, an attorney cannot acquire a lien for his compensation upon a judgment obtained by him, unless he has a special agreement as to the amount thereof.
- (2) **IDEM.**—A mere debt due by the adverse party to the client of the attorney is not money in hands of such party within the meaning of subdivision 3 of said § 1012, and therefore no lien can be acquired upon it for the compensation of the attorney who may obtain a judgment therefor.

DEADY, J.

On January 9th, 1874, J. L. Scoggin was adjudged a bank-

rupt in this Court, being at the time administrator of the estate of A. H. McQuinn. On April 7, 1877, the County Court of Multnomah County, upon the consideration of the final account of said administrator, gave a decree disallowing \$876 of the same, and made an order directing the distribution of this amount among the children and heirs of McQuinn, eleven in number. Upon the examination of said final account, C. P. Mason appeared as attorney for said heirs, and as such was instrumental in procuring the disallowance aforesaid. Mason had no agreement with said heirs, most of whom were minors, for compensation for his services; but on April 10th, 1879, he gave notice to the bankrupt that he claimed a lien upon the decree aforesaid for his compensation as attorney for said heirs, "to the extent of 25 per cent. upon each heir's share in distribution, together with the full amount of costs and disbursements," which were \$33.35. On April 25, 1879, Mason filed a proof of debt with the Register for the sum of \$252.35, that being the amount of his claim for services and costs and disbursements. The assignee objected to the proof, and specified as follows:

(1) That said claim, except the sum of \$33.35 costs, is not one against the estate of the bankrupt, nor were the alleged services rendered to or for him. (2) That said claim is not a lien upon the fund in the hands of the assignee. (3) That the alleged lien cannot affect moneys not in the hands of the administrator; and (4) that said claim not being one against the bankrupt, cannot be proven against his estate or become a lien thereon.

Seven of the eleven heirs of McQuinn proved their claims each for the one eleventh of the amount—\$79.63—while the other four proved their claims for less 25 per centum of said amount, which they admitted to be due Mason.

The Register admitted the proof of debt for the amount of the costs, and 25 per centum of four of the several sums claimed by the heirs, and upon the request of the parties certified the question here.

The claimant relies upon § 1012 of the Civil Code, which provides that among other things, that "an attorney has a

lien for his compensation, whether specially agreed upon or implied." * * * "3. Upon money in the hands of the adverse party, in an action, suit or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party. 4. Upon a judgment or decree to the extent of the costs included therein, or *if there be special agreement to the extent of the compensation specially agreed on*, from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk when such judgment or decree is entered or docketed;" and insists that he acquired a lien under one or the other of these subdivisions from the time of giving the notice to the bankrupt, and that in equity he is to be deemed an assignee to the amount of such lien, and may therefore prove his claim for the same directly against the estate of the bankrupt. In support of this proposition, he cites *Marshall vs. Meech*, (51 N. Y., 140,) and *Wright vs. Wright*, (70 N. Y., 98,) wherein it was held that an attorney has a lien upon a judgment recovered by him for an *agreed* compensation for the amount of such compensation and costs as against all persons having notice of the same; and that to the amount of such lien he is to be deemed an equitable assignee of the judgment.

This case does not fall within the third subdivision of § 1012. "Money in the hands of the adverse party," within the meaning of this provision, is something more than a mere *debt* from such party to the client of the attorney who claims the lien. On the contrary, "money" in his hands, means some specific funds which have actually come into his possession as custodian or trustee, and to obtain which the action or suit is brought. After judgment is obtained upon the claim or demand, or for the money, the lien of the attorney can only be acquired upon the judgment under Subdivision Four of said section.

Whether this sum was ever in the hands of the administrator as money, or whether his liability therefor grew out of a negligent failure to collect the same from the debtors of the estate, does not appear. The decree of the County Court,

although referred to in the proof of debt, is not found among the papers presented to the Court, and if present, would probably shed no light on the subject.

Nor is the claimant entitled to a lien upon the decree in the County Court under subdivision 4 of said § 1012, because it does not appear from the notice thereof or otherwise, that there was any special agreement as to the amount of compensation to be received for his services. A lien is not given upon a judgment for the attorney's compensation, only to the extent the latter has been specially agreed upon. He cannot acquire a lien for compensation which is to be measured by a *quantum meruit*. Strictly speaking, the claimant is not entitled to make proof of any claim against the estate, except for the costs. Having no lien upon a decree, or money for his compensation, he is not a creditor of the estate of the bankrupt. His claim for services is against the heir of McQuinn, and if need be, may be enforced against them in an ordinary action, in which the value of the services may be ascertained by the verdict of a jury. But as four of the heirs have practically acknowledged the claim of Mr. Mason, by deducting the amount from their proofs of debt, his proof may stand for that amount and the costs as ordered by the Register—\$112.98. It is also a question, whether the notice of the alleged lien having been given after the administrator had been adjudged a bankrupt, should not have been given to his assignee in bankruptcy. Besides, it does not appear when this defalcation took place, or this liability occurred. It was after the administrator was adjudged a bankrupt; then, neither the heirs nor the attorney have any claim upon the assets of the estate, which belong wholly to the creditors existing at the time of the adjudication. In such case, the administrator is liable to them as if he had never been adjudged a bankrupt.

The ruling of the Register is affirmed.

O. P. Mason, in propria personam.

John Callin for the assignee.

Supreme Court of Kansas,

JUNE, 1879.

CHALLIS vs. MCCRUM.

NEGOTIABLE INSTRUMENTS—WARRANTY BY INDORSEMENT.

The vendor of a bill or note, notwithstanding he transfers the same by an indorsement without recourse, impliedly warrants, by the very act of transferring, that the prior signatures to the paper are genuine, and so far at least as affected by his dealings with, or relations to, the paper, that it expresses upon its face the exact legal obligations of all such prior parties.

BREWER, J., delivered the opinion of the Court.

On December 4, 1871, plaintiff in error loaned one Edward A. Ege \$250, and took his note therefor in the sum of \$265, payable to Richard Probasco, or bearer, and secured by mortgage. Long after its maturity, and in 1876, several payments having been made thereon in the meantime, plaintiff in error sold the note for its then face value to defendant in error. At the time of such sale he indorsed it "without recourse, W. L. Challis." McCrum sued on the note. Ege plead usury. The plea was sustained, and McCrum recovered \$229.90, less than the face value of the note, for which sum he brought this action. A demurrer to the petition was overruled, and this ruling is now presented for review. Can the action be sustained? Of course, no action will lie on the indorsement, for by his written contract Challis expressly declined to assume the liabilities of an indorser. If sustainable at all, it must be as against him as a vendor and not as an indorser, and upon the doctrine of an implied warranty. The theory of the defendant in error is, that every vendor of a bill, bond or note impliedly warrants that it is what it purports on its face to be, the legal obligation of the parties whose names appear on the instrument, and that the character of the indorsement, or the lack of an indorsement, in no manner affects this implied warranty. On the other hand, the counsel for plaintiff in error lays down the broad proposition that "there is no such thing as implied warranty in the

sale of chattels," and that in the absence of express warranty the maxim *caveat emptor* is of universal application. It is clear, that the character of the indorsement cuts no figure in the question. As stated, no action will lie on it. But further, the restriction is only as to his liability as indorser, and in no manner affects his relation to the paper as vendor. An unqualified indorsement is the assumption of a conditional liability. The indorser becomes a new drawer, and is liable on the default of the drawee. "Without recourse" does away with this conditional liability. It leaves the indorsement simply as a transfer of title and the indorser liable only as vendor. Yet it leaves him a vendor and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer and transferable by delivery. *Hammum vs. Richardson*, (48 Vt., 508.) Independent, therefore, of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: 1st, that there is an implied warranty of the genuineness of the signatures; and, 2d, that there is no warranty of the solvency of the parties. It is unnecessary to more than refer to a few of the authorities upon these propositions. *Byles on Bills*, 123, 125, and cases in notes; *Jones vs. Ryde*, 5 Taunt., 488; *Gurney vs. Womersley*, 4 Ell. & Bl., 133; *Gompertz vs. Bartlett*, 24 Eng. Law & Eq., 156; *Terry vs. Bissell*, 26 Conn., 23; *Merriam vs. Wolcott*, 3 Allen, 259; *Aldrich vs. Jackson*, 5 R. I., 218; *Lobdell vs. Baker*, 3 Mete., 469; 1 Add. on Cont., 152; *Ellis vs. Wild*, 6 Mass., 321; *Eagle Bank vs. Smith*, 5 Conn., 71; *Shaver vs. Ehle*, 16 Johns., 201; *Dumont vs. Williamson*, 18 Ohio St., 515; 2 Parsons on Notes and Bills, chap. 2, § 2.

But in the case at bar the signature of the makers was genuine. The objection is, that it was never his legal obligation to the full amount for which it purported to be. How far is there any implied warranty in this respect? A reference to some of the leading cases will throw light upon this question.

In *Thrall vs. Newell*, (19 Vt., 203,) it appeared that one of the makers of a note was insane. The vendor made a written

assignment, in which was a description of the note, and the Court construed this as an express warranty that the instrument was the legal obligation of the apparent makers, and one being incapable of contracting, gave judgment against the vendor on account of this breach for the amount received by him. While the judgment of the Court is rested upon the fact of an express warranty, the judge who writes the opinion expresses his individual conviction that the same result would follow on a mere transfer without any express warranty, and quotes approvingly an extract from Rand's edition of Long on Sales, that "there is an implied warranty in every sale that the thing sold is that for which it was sold."

In *Lobdell vs. Baker*, (3 Metc., 469,) it appeared that the owner of a note procured the indorsement of a minor and then put the paper in circulation. He was held liable to a subsequent holder. Chief Justice SHAW, delivering the opinion of the Court, says: "Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties, but he has a right to believe without inquiring that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained, the purchaser of such a note has a right to believe upon the faith of the security itself that it is indorsed by one capable of binding himself by the contract which an indorsement by law imports."

In *Hannum vs. Richardson*, (48 Vt., 508,) a note was given for liquor sold in violation of law and was by statute void. Defendant knew its invalidity, transferred it by an indorsement without recourse, and he was held liable to his vendee.

In *Delaware Bank vs. Jarvis*, (20 N. Y., 226,) a usurious note was sold and the vendor was adjudged liable, not merely for the money received by him, but also the costs paid by his vendee in a suit against the makers on the note.

In the opinion Mr. Justice COMSTOCK uses this language: "The authorities state the doctrine in general terms, that the vendor of a chose in action, in the absence of express stipulation, impliedly warrants its legal soundness and validity.

In peculiar circumstances and relations the law may not impute to him an engagement of this sort. But if there are exceptions they certainly do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it. In this case the defendant held a promissory note which was void, because he had himself taken it in violation of the statutes of usury. When he sold the note to the plaintiffs and received the cash therefor, by that very act he affirmed in judgment of law that the instrument was unattainted, so far at least as he had been connected with its origin."

In *Young vs. Cole*, (3 Bing. N. C., 724,) certain bonds were sold as Guatemala bonds, which turned out afterward to be lacking the requisite seal, and the vendor, though ignorant of the defect and innocent of wrong, was compelled to refund the money. The thing in fact sold was not the thing supposed and intended to be sold.

In *Gombertz vs. Bartlett*, (24 Eng. Law & Eq., 156,) the plaintiff discounted for the defendant an unstamped bill, purporting on its face to have been a foreign bill, drawn at Sierra Leone and accepted in London, but which was in fact drawn in London. If actually a foreign bill, it required no stamp and was valid, but being an inland bill, it required a stamp to make it a valid bill in a Court of Law. The acceptance was genuine, and the acceptor had previously paid similar bills. But the acceptor becoming bankrupt, the Commissioner refused to allow it against his estate because not stamped. Thereupon plaintiff, who had sold the bill and been compelled to take it up, brought his action to recover the price he had paid for it, and the action was sustained. Lord CAMPBELL, before whom the case had been tried, and who then held adversely to the plaintiff, said: "I then thought that the rule *caveat emptor* applied; but after hearing the argument and the authorities cited, I think the action is maintainable, and upon this ground, that the article sold did not answer the description under which it was sold. If it had been a foreign bill, and there had been any secret defect, the risk would have been that of the purchaser; but

here it must be taken that the bill was sold as and for that which it purported to be. On the face of the bill it purported to be drawn at Sierra Leone, and it was sold as answering the description of that which on its face it purported to be. That amounted to a warranty that it really was of that description."

In *Ticonic Bank vs. Smiley*, (27 Me., 225,) an over-due note was transferred and with this indorsement: "Indorser not holden," yet it was decided that the indorser was liable to his vendee for any payment made on the note before the transfer or any set-off existing against it of which the note gave no indication and the vendor no information.

In *Snyder vs. Reno*, (38 Iowa, 329,) it was held that there is an implied warranty that there has been no material alteration in the paper since its execution. The Court says: "We have no doubt that there is an implied warranty of the transferer that there is no defect in the instrument as well as that the signature of the maker is genuine." See, also, *Blethen vs. Lovering*, 58 Me., 437; *Ogden vs. Blydenburgh*, 1 Hilt., 182; *Fake vs. Smith*, 2 Abb., (N. Y. App.,) 76; 2 Parsons on Notes and Bills, chap. 2, § 2, and cases in notes; *Terry vs. Bissell*, 26 Conn., 23; 1 Daniels on Neg. Instruments, § 670.

In this the author thus states the law: "When the indorsement is without recourse, the indorser specially declines to assume any responsibility as a party to the note or bill; but by the very act of transferring it he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse; but who is, nevertheless, liable if he draws upon a fictitious party or one without funds. And, therefore, the holder may recover against the indorser without recourse: (1) If any of the prior signatures were not genuine; or (2) if the note was invalid between the original parties because of the want or illegality of the consideration; or if (3) any prior party was incompetent; or (4) the indorser was without title."

These authorities fully sustain the ruling of the District Court. The note was not the legal obligation of the maker

to the full amount. As to the usurious portion it was as if it were no note.

This was a defect in the very inception of the note. It was known to the vendor and arose out of his own dealings in the matter. By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof.

The suggestion of counsel that the change in the usury law by the legislation of 1872 affected the right of recovery upon the note has been already decided adversely in the case of *Jenness vs. Cutler*, (12 Kans., 500.)

The judgment will be affirmed.

All the justices concurring.

Recent Decisions.

PARTNERSHIP LAW.

Action by one Partner against Another.—An action at law can be maintained by one partner against another to recover a balance due whenever the adjustment of the matter in controversy does not involve the settlement of any partnership account. A partnership between W. and L. was dissolved by mutual consent, W. agreeing to take the partnership property and the book accounts, and to pay L. therefor \$300. After payment of this sum, W. discovered that many of the book accounts had been paid to L. prior to the dissolution, and that he had failed to credit them. W. brought an action against L. to recover the amount so paid to L. Held, that the action was well brought. The Court said: "Appellant claims that plaintiff could only recover, if at all, by instituting proceedings in a Court of Equity to repudiate his contract of purchase, and to open up and settle the accounts between the partners. This position is not, in our opinion, tenable. In order to enable one partner to maintain an action at law against his copartner for a balance due on settlement of accounts, it is necessary that there should have been a balance found and agreed upon by both parties. (*Ross vs. Cornell*, 45 Cal. 136; *Bidgway vs. Grant*, 17 Ill. 118; *Par-*

sons on Partnership, 278.) The testimony offered upon the part of the respondent, shows that both parties examined the books and accounts kept by the firm; that Wicks believed, and had reason to believe, that the accounts sued for had not been paid; and that there was fraud and deception upon the part of Lippman in failing to give the proper credits, or to notify Wicks that the accounts had been paid. It is expressly averred in the complaint, that a final balance was struck and ascertained, and this allegation is not denied in the answer. We are of the opinion that the facts of this case bring it substantially within the rule above stated. The accounts are shown to have been 'cut out from the partnership,' and this is all that the law requires. (Parsons on Partnership, 282.) An action at law can always be maintained by one copartner against another for any money that has been withdrawn by him in excess of his share. *Wiggin vs. Cumings*, (8 Allen, 354.) In the present case it appears that Wicks, in ignorance of the true state of the accounts, was induced by the deception of Lippman to pay more than he would have paid had he been informed of the true state of the facts, and inasmuch as the adjustment of the matters in controversy does not involve the settlement of any partnership accounts, the plaintiff is, upon well-settled principles, entitled to maintain this action." (Parsons on Partnership, 284; *Adams vs. Funk*, 53 Ill. 219; *Russell vs. Grimes*, 46 Mo. 411; *Crosby vs. Nichols*, 3 Bos. 450.) Nevada Sup. Ct., October, 1878. *Wicks vs. Lippman*. Opinion by HAWLEY, C. J.

Rights of Partners inter sese—purchase by one Partner with Partnership funds.—When property is purchased with partnership funds, it inures to the benefit of the partnership. Each partner is a principal, and also is agent for every other member of the firm; and a purchase made by one partner with the funds of another partner inures to the benefit of such partner, and cannot be applied by the agent to his own personal profit. Thus C. and S. were partners, C. managing the business and receiving the money. C. having partnership funds in his hands, and being about to make large sales of the firm property, purchased a claim against S. for 25 per cent. of its face, and in his settlement with S. sought to ap-

ply the account against the partnership funds in his hands. In an action on the claim, *held*, that C. would recover no more than he had paid for the claim. The Court said: "The rule is well settled that the authority of a partner to dispose of the partnership funds extends only to the business of the partnership itself; and any disposition of these funds by any partner beyond said purpose is in excess of his authority as a partner, and a misappropriation of the funds, for which the partner is responsible to the partnership. (*Rogers vs. Batchelor*, 12 Pet. 230; *Dob vs. Halsey*, 16 Johns. 34; *Gram vs. Cadwell*, 5 Cow. 489; *Homer vs. Wood*, 11 Cush. 62; *Purdy vs. Powers*, 6 Barr. 492; *Greeley vs. Wyeth*, 10 N. H. 15; *Sauntry vs. Dunlap*, 12 Wis. 464; *Vilas vs. Bangs*, 36 *Id.* 136.) Let us apply this principle to the case at bar. Here, during the existence of the partnership, and while one of the partners was holding a large surplus of profits in his hands belonging to his copartner, he purchases a claim against his copartner for a little more than twenty-five cents on the dollar of its face value, and seeks to set it up against his copartner for the entire sum due on the face of the contract. Where a transaction is carried on with partnership funds, it inures to the benefit of the partnership. No partner has a right to use the partnership stock or funds for his own private benefit. The law of partnership is but a branch of the law of principal and agent. Each partner is a principal, and each is an agent for every other partner, and within the scope of the partnership all are bound by the contracts of one. Partners owe to each other the most perfect good faith, reasonable diligence, and the exercise of their best judgment and discretion. Profits made by an agent, inure to the benefit of his principal. (Story on Agency, § 210, and cases cited.) And why should not the same rule obtain in cases of partnership, particularly where the partner is holding back the proportion of funds due his copartner? In such a case, it is safe to assume that the purchase was made with funds belonging to his copartner, it being sought to apply the claim in satisfaction of the amount due. Nebraska Sup. Ct., April 9, 1879. *Catron vs. Shepherd*. Opinion by MAXWELL, C. J.

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Current Topics.

VOLUME 52 of California Reports will be ready for delivery in a few days.

WE will publish in our next number the opinion of Mr. Justices FIELD and SAWYER, in the Chinese "Queue Case."

NOW that our Supreme Court has determined to hear no cases at this term, except criminal cases, and those of a public nature, we may confidently say to our patrons, that we will soon place before them quite a number of opinions, as it is the purpose of the Court to dispose of all the business now before them by the end of the year.

THE Supreme Court of this State has entered an order that no causes be heard at this term, except criminal causes, and causes involving public interests. Presumably, the reason for making such an order is, that the Court now has before it as many cases, which have already been argued and submitted as can be considered and disposed of before the new Court, under the New Constitution, gets at its labors. To hear arguments upon causes, not possible to be disposed of by the present bench, would entail much useless labor upon the attorneys of record in such cases, besides the loss of time to the Court; for a re-argument would have to be made before the new Court. Notwithstanding such an order will carry over a long calander of cases, the delay seems unavoidable.

Supreme Court of Oregon.

JANUARY TERM, 1879.

RAMSAY, RESPONDENT, vs. LOOMIS *et al.*, APPELLANTS.

1. In a complaint to reform a deed for an alleged mistake in the description of the land the complaint is sufficient, if it set out the defective description and the true description and allege the mistake.
2. A deed which is defective is not so far void that in a suit to reform it, it cannot be used as evidence to prove unequivocal declarations of the grantor contained in it.
3. Land claimed under the "donation act" is segregated when the notification is filed.
4. Land claimed under the "donation act" in which the settler has resided for four years, and cultivated it during that time, can be sold by such settler before the patent is issued.
5. In a suit to reform a deed, lands which were not included in the deed, but omitted by mistake, may be inserted in the deed as reformed.

PER CURIAM.

The first point presented in this case, is whether the allegations in the complaint are sufficient to show a cause of suit.

The complaint set out the description of the land as contained in the defective deed, and then says that it was the intention of the grantors to convey a parcel of land, not as described in the deed, but having a description which is given, and alleges that the description in the deed does not describe the land intended to be conveyed; that the parties supposed the deed did convey the land bounded by the alleged true description. All that is necessary in the complaint is, that it shall plainly show to the Court the alleged mistake which it is asked to correct, and if the false description and the true description are both set out in the complaint, the Court is informed of all the facts which are necessary to enable it to grant the relief prayed for. (1st Abbott's forms, page 586; 2 Estees' pleadings, 430.) It was claimed by the attorney for appellant that the original contract of sale should be set out; this is true, but it is set out. The statement in a complaint, that a party sold lot two, but by mistake, made a deed to lot one, states the whole contract

so far as the description of the thing sold is concerned; by this statement the Court is informed that the deed is made for lot one, and that it ought to be for lot two, and the Court is asked to insert in the deed the word two instead of one. More words could not make the matter any plainer, and this is all that is required in practice. If the mistake is denied, then an issue is made, which must be determined by the evidence. Some question was made as to the amount of evidence necessary to reform a deed. When the answer denied the alleged mistake. This question was settled in the case of *Gillespie vs. Moore*, (Johnson's Chancery Pr.,) where it was held that a mistake could be established by oral testimony, and such has been the practice of this Court in several cases heretofore considered. (*Lewis vs. Lewis*, 4th Oregon, 177; *Matthews vs. Eddy*, 4th Oregon, page 225; *Newson vs. Greenwood*, page 119; and *Raymond vs. Coffee*, 5 Oregon, 132.) In the case of *Newson vs. Greenwood*, in speaking of the character and amount of the evidence necessary to show a mistake in a deed, the Court say, "the evidence must be clear and satisfactory, so as to establish the mistake to the entire satisfaction of the Court."

In this class of cases where the deed sought to be reformed shows imperfection on its face, as it does in this case, this fact is evidence to show that it does not express the intention of the parties. The deeds in this case in the description of the land are definite. The first course is northwest 160 rods, the next southwest 100 rods, thence north 60, east 160 rods, thence north to the place of beginning, not giving the length of the last line; these courses cannot be literally correct and describe and bound 100 acres of land; so, it is evident the parties to the deed containing this description were in error in that description of the 100 acres. This needs no parol proof, for it is to be presumed the parties intended to describe and convey some definite piece of land by this deed of the area of 100 acres. Now the plaintiff comes, and in his complaint shows to the Court what land it was the intention of the grantors in these deeds to convey, and the grantees to receive, and this is denied. Plaintiff claims that the land intended to be conveyed was 100 acres in the north-

east corner of the donation land claim of James Loomis, extending 160 rods on the north line and 100 rods on the east line of said claim, and being in the form of a parallelogram 160 rods long and 100 rods wide. Now, let us examine the evidence, and see if plaintiff has proved his obligation by evidence, which should fully satisfy the Court.

1. Let us examine this deed which is sought to be reformed. The description in it is a parcel of land in Multnomah County, commencing at the northeast corner of James Loomis' claim, thence northwest on said claim line 160 rods, thence southwest 100 rods, thence north 60, east 160 rods, thence north on said claim line to the place of beginning, so as to include 100 acres, and being a part of the claim held by Mr. Loomis as a donation.

It was admitted that the courses given in this case cannot agree with the claim lines, therefore claim lines which are monuments must govern, and the courses must be rejected. Thus rejecting the courses, the description is beginning at the northeast corner, that is a fixed point, but the course having been found incorrect is rejected, and we must inquire in what direction the first course was intended to run; it was to be on the claim line, and from the northeast corner. Now, let us go to the last line, which is described in these words, "thence north to the place of beginning;" it must then approach the northeast corner from the south, and it comes from the end of the third line which was 160 rods long, and the land intended to be conveyed was 100 acres. The length of the three first lines being given being respectively 160, 100 and 160 rods, and the four lines enclose an area of 100 acres, the fourth line must be 100 rods long, and the long lines must be parallel to each other, as also the short lines, and the tract of land a parallelogram, and as the fourth or last line comes to the northeast corner (the place of beginning) from the south, and on a line of said land claim. This land would necessarily be in the northeast corner of this land claim, extending 160 rods on the northern line and 100 on the eastern line of the claim, if the land claim was bounded by lines running to the cardinal points. But the evidence shows that the northern line of the claim runs north

63 degrees east, and the eastern line runs north about 23 degrees west, so that both these lines approach the northeast corner bearing north. So, we will look further into the testimony to see in which direction the first named line, of 160 rods, runs, that is, did it run westerly along the northern line of the claim, or along the eastern line bearing south by east.

It appears from a deed in evidence, executed by Christopher Loomis, over to the heirs of James Loomis, that he recognized this land as being in the northeast corner of this land claim, and extending 100 rods on the eastern and 160 rods on the northern claim line; also, the same in deed of George W. Fuller and wife, who were also heirs of said Loomis. William Gatton, who owned a land claim adjoining Loomis on the north, swears that he knew the lines of the Loomis claim; that he knew them as early as 1853; that there was a blazed line around the claim and stakes at the corners, and that in 1858 a surveyor surveyed the north line of this claim and set a stake on the division line between James Loomis and wife, where that line terminates on the north line of the claim; also, that said surveyor run a part of the division line between James Loomis' and wife, and that a stake was set on this line 100 rods from said north line. And said witness further states, that James Loomis told him that he had set a stake on this division line 100 rods from the north line of his claim, and that it was the corner of the land he, Loomis, had sold to Perry Parker, or where that piece came to. Witness also states that Loomis told him he did not set a stake at the southeast corner of this 100 acre tract because it came in the lake.

There is no evidence that directly contradicts these statements or tends directly to prove that the 100 acre tract was in any other location. And the deed shows that it was the intention of James Loomis to convey 100 acres of land; so, the only matter to be determined is its location. A deed in which the description of the land is so uncertain as that the location of the land cannot be determined from the deed, is not on that account so void that it cannot be used in a proceeding to correct it as evidence of unequivocal declarations

of the grantor contained in it, as in this case the deed is evidence that the piece intended to be conveyed was 100 acres, and that it was in the said claim of Loomis, and had its northeast corner at the northeast course of the claim, and taking all the evidence in this case we think it is sufficient to show that the land intended to be conveyed is as claimed in the complaint, and so far as the mistake alleged in complaint is concerned, it is established by the evidence.

It was claimed in the argument that a Court of Equity would not correct a deed so as to make it cover land which was not mentioned in it, and consequently, no relief could be granted in this case. It is a common practice of Courts of Equity to correct mortgages so as to cover lands which were intended to be pledged for debts, but by mistake were omitted from the mortgage, or when the mortgage described other land than that intended, to so correct it as to describe the land intended to be mortgaged; there can be no sound reason urged why a man shall lose a parcel of land which he has by mistake included in a deed stricken out because he has not paid for it, and not have a parcel of land inserted in a deed, which by mistake was left out for which he has paid the full consideration, and there is no such distinction in reason or by authority.

It is further claimed, that no relief can be had in this case, because the final survey of this claim was not made, and the exact location of the land determined until after the death of James Loomis, and that the land went to the heirs of James Loomis by the U. S. patent, which in this case was issued to the widow and heirs. That is, that there was no segregation of the land before the final survey; we think, such is not the rule; the settler is required to describe this land in his notification, and when such notification is filed, the land is segregated; and such was held to be the law in the case of *Fitzpatrick vs. Du Bois et al.*, (2 Sawyer, page 434,) tried before the United States Circuit Court of Oregon, and from the time of filing the notification, the settler has in the land an estate of inheritance which can be defeated only by his failure to comply with the act of Congress. It is also claimed, that patent being issued to the heirs of James Loomis, that

they take this land free from any incumbrance on it, created by James Loomis; whose estate in the land ended with his life. This point has been decided adversely to this proposition by this Court, in the case of *Dolph vs. Barney, Oregon*, when it was held that a settler on the public land under the donation law of Oregon, holding under the fourth section of this act, after four years' residence and cultivation, had an estate in fee in the land which he could sell before he obtained a patent thereto, and that his heirs, on receiving the patent after his death, were bound by his deed, and took the patent subject to such sale, and that decision is decisive of this point in this case.

Having considered all the points necessary to a decision of this case, it is ordered, that the decree of the Circuit Court be affirmed.

United States Circuit Court,

DISTRICT OF OREGON.

B. L. LEWIS,

VS.

The OREGON CENTRAL RAILWAY CO.

ACTION TO RECOVER POSSESSION OF REAL PROPERTY.

- (1) **DEMURRER.** A demurrer does not lie to a part of a plea or defence, or immaterial matter therein, but it must deny its sufficiency as a whole.
- (2) **PLEA OF EASEMENT.** A plea which states that the defendant in an action of ejectment is the owner of a perpetual right of way over the premises in controversy, and that the owners thereof granted it the same, is a sufficient statement of the nature and duration of such estate or interest in the premises.

J. H. Woodward, for the Plaintiff.

Joseph N. Dolph, for the Defendant.

DEADY, J.

This is an action to recover the possession of lots one in blocks 6 and 10, in the Portland Homestead Association.

The complaint alleges, that the plaintiff is a citizen of the State of California, and the defendant a corporation duly organized under the laws of Oregon, and doing business therein as a railway company; that the plaintiff is the owner in fee-

simple of said premises, which are of the value of \$2,000, and the defendant wrongfully withholds the possession of the same.

The answer contains a general denial of the allegations of the complaint, except the citizenship of the parties. It also contains a special defence to the effect that the road of the defendant is constructed over, and operated upon, a certain portion of said premises therein described, and amounting to 56-100 of an acre, of which it is in the possession; that in 1869 said premises were the property in fee-simple of Philinder, wife of James Terwilliger, and that said James, who is still living, was then in the possession of the same, and had an estate therein for his own life; that said James was also the agent of his wife to manage said lots, and receive from the defendant compensation for the right of way across the same, to construct and operate its railway thereon; that as said agent, and for himself in the year aforesaid, said Terwilliger received from the defendant the sum of \$1,700 for timber taken by the defendant from the premises, and other lands of said James and Philinder to aid in the construction of its railway, and in consideration thereof, also agreed that the defendant should have a perpetual right of way over the premises for its railway, and for the consideration aforesaid then granted to the defendant such right of way and it is now the owner thereof; that the defendant, relying upon said agreement, built its railway over said premises, and has used the same ever since for the purpose of operating the same between Portland and St. Joseph; and that the interest of the plaintiff in the premises was acquired from said James and Philinder after 1869, and while the defendant was in the possession and use of the same for the purposes aforesaid.

The plaintiff demurs to the special defence.

The demurrer is not taken to the whole of this plea or defence, but omits the allegations concerning the ownership of the lots by the Terwilligers and the portion now in possession of the defendant, and also the allegation, to the effect that for the consideration mentioned, said James Terwilliger "granted" to the defendant said right of way, and it is now the owner thereof.

A demurrer does not lie to a part of a plea or defence, but it most controvert its sufficiency as a whole. Redundant and irrelevant allegations may be stricken out of a pleading on a motion, but they cannot be objected to by demurrer.

By §§ 771—775 of the Or. Civ. Code, taken from the Statute of Frauds of 29 Charles II, it is declared that "no estate or interest in real property" other than a lease for a year can be created otherwise than by operation of law or a writing subscribed by the party creating the same, and "executed with such formalities as are required by law;" and that "an agreement * * for the sale of real property or any interest therein" is void, unless the same is in writing and subscribed by the party to be charged.

An easement—as a right of way—is an interest in lands within the meaning of this provision, and can only be created by writing. (1 Wash. R. P. 398; 3 Kent 452.) Upon the agreement it was assumed that it appeared from the defence, that the defendant never acquired any easement or right of way over the premises for want of a conveyance of the same; and the question principally discussed was, that admitting this proposition, whether or not the transaction set forth in the plea amounted to a license to the defendant to enter and occupy the premises for the purpose of a railway track, and if it did, is the same revocable at the pleasure of the licensor? I have carefully investigated the subject, but upon an examination of the pleadings, I find that as they now stand the question does not arise upon the demurrer.

The defendant having alleged in its plea that it was the owner of the track or tract upon which its railway is constructed, and that it had a grant from the plaintiff's grantor of the same, I am of the opinion that there is sufficient in the plea to constitute a defence to the action, notwithstanding all the other allegations thereof may be immaterial. The code (§ 316) only requires the defendant to plead the nature and duration of its estate in the premises or license, or right to the possession thereof, "with the certainty and particularity required in a complaint." Now, in a *complaint*, it was never necessary to state more than that the plaintiff was the owner of a legal estate or interest in the premises, and en-

titled to the possession thereof; and whether said estate or interest was created by operation of the law or writing, was unnecessary to state. (*Lamb vs. Starr*, 1 Deady 353.) The defendants having alleged that the owners of the premises—the Terwilligers—*granted* it the perpetual right of way thereon, before making the conveyance under which the plaintiff claims, thereby assert every fact which the law implies therefrom. (Chitty, p. 253.) A *grant* can only be made by a deed, and the allegation of the existence of a grant necessarily implies a deed, as livery of seisin is implied in the use of the word “*infeoffed*.” The defendant also alleges in terms, that it is the owner of such right of way. In either case, it has sufficiently stated the nature and duration of its right to the possession of the premises, or so much thereof as it defends for. *Withered vs. Wiberg*, 4 Saw. 234. The demurrer is overruled.

Supreme Court of Missouri.

JUNE, 1879.

STATE vs. COLLIER.

ELECTION—OFFER OF CANDIDATE TO PERFORM DUTIES OF AN OFFICE FOR LESS THAN SALARY.

A candidate for a county office publicly pledged himself before the election to perform the duties of the office for much less than the compensation established by law, by reason whereof a sufficient number of voters were induced to vote for him to secure him the election. In an action of *quo warranto*, held, on demurrer, that an information setting forth the above facts was sufficient.*

At a mass convention of the voters and taxpayers of Calaway County, held in the city of Fulton, August 17, 1878, there were present about one thousand citizens of the county, for the purpose of nominating candidates to be voted for, for the various county offices at the general election in November of that year. Respondent, Collier, was a candi-

* In the similar case of *State vs. Church*, (5 Or., 375;) S. C., (20 Am. Rep., 748,) the information was held bad for not showing that the voters influenced by such offer were taxpayers of the county, or would otherwise be benefited by the performance of the promise.

date before the convention for the office of Probate Judge of the county, and he offered a resolution, which was adopted by the convention, requiring delegates to pledge themselves to perform the duties of the various county offices for much less than the compensation allowed by law, among others, that of Probate Judge for \$1,200. Respondent was nominated for Probate Judge, accepted the nomination, made the pledge required by the resolution, and canvassed the voters of the county prior and up to the day of the election, pledging himself in his public speeches, in the newspapers of the county, and in his personal solicitations to the voters, to perform the duties of the office, if elected, for \$1,200 a year, declaring that the legal fees amounted to \$2,600 per annum. The ballot, on which respondent's name as a candidate was printed, and which was voted by the voters, was printed with the names of other candidates nominated at the county convention, and was headed: "Low Salary Democratic County Ticket." At the general election, November 5, 1878, respondent was elected Probate Judge of the county, receiving two hundred votes more than his competitor, duly qualified, and entered upon the duties of his office. The Attorney General, February 7, 1879, filed his information in the Supreme Court for writ of *quo warranto* against respondent, setting up these facts, and asking judgment of ouster, to which respondent demurred, assigning specific reasons which are sufficiently noticed in the opinion.

Attorney General Smith, for Relator.

Boulware, Snell & Flanagan, for Respondent.

SHERWOOD, C. J., delivered the opinion of the Court.

The legal sufficiency of the information being questioned by the demurrer, requires at our hands an examination into such alleged sufficiency.

Every one will concede, that it is of the first importance that popular elections should be conducted in such a way as to exempt them, so far as the infirmities incident to human agencies will permit, from improper influences. Here the demurrer confesses that being induced by the offers of respondent to take for his own use only \$1,200 out of \$2,600, the aggregate fees of the desired office of Judge of Probate,

two hundred of the voters and taxpayers of the county who would otherwise have voted for respondent's rival, changed their purpose, and voted for respondent, who, but for such offers and their acceptance, would never have been elected. These admissions of the demurrer throw the burden of the assumed lawfulness of his acts upon the shoulders of the respondent, and the question arising upon the admitted facts is, whether the means employed by him to secure his election were lawful means—means such as this Court can sanction, when the respondent, called upon by our writ of *quo warranto*, to disclose his title to the office of Judge of Probate, discloses also that his title must, for its validity, ultimately rest upon the means of whose employment the State in her information complains.

In the recent case of *State vs. Purdy*, (36 Wis., 213; S. C., 17 Am. Rep., 485,) the question raised by this information was learnedly and exhaustively discussed, and in such a manner as to leave nothing to be desired, and the conclusion there reached that means similar to those employed in the present instance were not to be tolerated, and that the title to the office secured thereby would be declared invalid. There the contest was between two individuals as to whom was entitled to the office of County Judge; the relator claiming it in consequence of the reception of twenty-three more votes than the incumbent, but the latter claimed in his answer that the salary of County Judge was fixed at \$1,000; that relator, being a candidate for the office, published and circulated through the county a promise addressed to the electors thereof, that if elected County Judge he would perform all the duties, and furnish an office, and all other incidentals except the record books, for \$600 per annum during his term, and that *solely* by this offer, one hundred of the voters of the county were induced to vote for relator, thus securing his election. This was held sufficient on demurrer.

I am unable to distinguish this case in principle from that one. Here, it is true, the result of respondent's action, if he complied with his promise, will not be as there, the enriching of the county treasury—by refraining from with-

drawing therefrom a sum of money, and thereby benefiting, pecuniarily, each taxpayer in the county—but the legal effect of the offer of the respondent is in nowise different; for while he does not propose to enrich the treasury of the county, as in the Wisconsin case, he does propose to impoverish himself, and benefit every suitor who might come before him in his judicial capacity, by diminishing his lawful fees to less than one-half of their usual rate. In other words, he appealed, and the demurrer admits he was successful in that appeal—not to the fair and honest judgment of the voters touching his qualifications and fitness for the office to which he aspired, but to the cheapness with which he would discharge his judicial duties. He said to the voters in effect and with effect, "Elect me Probate Judge of your county, and no suitor who comes before me shall ever be charged even half the fees which the law allows"—thus making the office which he sought not a matter of qualification, but of bargain and sale. It is not necessary, in this case, to show, as claimed by respondent, that he or those who voted for him, have been guilty of the crime of bribery in its strict sense. In instances like the present—instances involving the freedom and purity of elections—that term possesses a broader significance. As is well said in the case above cited, "It may properly be employed to define acts not punishable as crimes, but which involve moral turpitude, or are against public policy." And there the Court held that, though the answer did not contain allegations of fact, showing that the relator, or any of the voters of the county, had been guilty of the criminal offense of bribery, yet that answer was sufficient; and that acts falling short of that crime in its more restricted and technical meaning, would justify the rejection of votes cast for the party made successful by the employment of the unlawful means. And Hawkins' Pleas of the Crown is quoted from extensively, and fully supports the position taken, where he says: "Also bribery sometimes signifies the taking or giving of a reward for offices of a public nature; and certainly nothing can be more palpably prejudicial to the good of the public than to have places of the highest concernment, on the due execution

whereof the happiness of both king and people doth depend, disposed of, not to those who are most able to execute them, but those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honor, which ought to be the reward of those who, by their industry and diligence, have qualified themselves for them, conferred on such who have no other recommendation but that of being the highest bidders; neither can anything be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expense they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectation." (Vol. 1, ch. 27, § 3.) Again, the learned author says: "It is of the utmost importance to the public welfare that, in the administration of the government, none but persons competent to perform the duties of their offices should be admitted into any department. But if the sale of offices were allowed to those who have the patronage and appointment, it is evident that there would be the greatest danger of situations being filled, not by those whose talents fitted them for the station, but whose purses enabled them to obtain it. The sale of offices may, therefore, justly be ranked as an offense against the political economy of the State." (Vol. 1, ch. 32, p. 748.)

In *Tucker vs. Aiken*, (7 N. H., 140,) a similar view was taken, concerning a practice which had obtained of putting up at public auction, and disposing of the office of constable to the highest, and of collector to the lowest bidder, the Court there saying in reference to the custom: "It has a tendency to divert the attention of the electors from the qualifications of the candidates, to the terms on which they will consent to serve, and makes the choice turn upon considerations which ought not to have an influence." The doctrine in that case, so far as concerns public offices, met with approval in Massachusetts, the Court, in *Alvord vs. Collin*, (20 Pick., 428,) saying: "We fully recognize the validity of the objection to the sale of offices, whether viewed in a moral, political or legal aspect. It is incon-

sistent with sound policy. It tends to corruption. It diverts the attention of the electors from the personal merits of the candidates to the price to be paid for the office. It leads to the election of incompetent and unworthy officers, and on their part to extortion and fraudulent practices to procure a remuneration for the price paid. Nor can we discover a difference in principle between the sale of an office for a valuable consideration and the disposing of it to a person who will perform its duties for the lowest compensation. In our opinion, the same objection lies against both." And the Legislature of Massachusetts applied the principle now being discussed in a still more marked manner in the year 1810. The town of Gloucester, though entitled to six representatives, for economical reasons, was accustomed to return but two members, whose pay had by law to be furnished by the town. In that year, however, for political considerations it was deemed desirable that the entire number of representatives to which the town was entitled should be elected. Whereupon several individuals, with a view to induce the town to elect a full delegation, gave a bond for the use of the inhabitants, conditioned that the whole expense of such a representation should not exceed the pay of two members. But it was held by the Legislature that the election was void, though none of the members elected from the town had any agency whatever in procuring the execution of the bond. The Supreme Court of Wisconsin, after citing the above and other authorities, say: "The doctrine which we think is established by the foregoing authorities, and which we believe to be sound in principle is, that a vote given for a candidate for a public office in consideration of his promise, in case he should be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county or any other corporation, is void."

We must regard the cases above cited as conclusive of this one, and reiterate the statement that the offers in this case made by respondent differ in no essential particular from the Wisconsin case—the offers in each case were equally deserving of condemnation, and were in spirit and purpose the same. For if bribery in its larger sense, in its application

to election cases, is the promise by the candidate to donate, if elected, a sum of money or other valuable thing to a third party, the promise in the case at bar ought to be held as falling within the same category, since, though the suitors who may have to appear before the candidate when Judge of Probate, cannot in the nature of things be designated, yet the corrupting tendencies of the offer remain the same; remain to swerve the voter from his duty as a citizen, to blind his perception as to the question he should consider, the qualifications of the candidate, and to fix them upon considerations altogether foreign to the proper exercise of the highest right known to freemen, the right of suffrage; a right upon whose absolutely free and untrammelled exercise depends the perpetuity of our republican institutions.

The transaction of which the State in the present instance complains may have been entered into with laudable motives, but it is, as we think has been successfully shown, decidedly demoralizing in its tendencies, and utterly subversive of the plainest dictates of public policy. The maxim in such cases should be *obsta principiis*, and it is only by a rigid observance of which by the Courts that the purity of elections can be preserved. The Legislature of this State has, as we are informed, at its last session enacted a statutory prohibition against the employment in elections of agencies such as have been condemned, thus giving legislative recognition to the principles herein enunciated.

Holding these views, the information will be held sufficient in law, the objections taken thereto by the demurrer not well taken, and the respondent required to plead further. All concur.

High Justice Court.

QUEEN'S BENCH DIVISION.

EASTLAND vs. BURCHELL.

The authority of a wife to pledge the credit of her husband, is not an inherent, but a delegated authority. If she binds him, it can only be as his agent.

Where a wife leaves her husband without cause, she carries no implied authority to bind him even for necessities; but when she is driven

away by his fault, he is bound to maintain her elsewhere, and she becomes of necessity his agent to supply her wants upon his credit. In such case only, is the question of the adequacy of an allowance or the suitability of the goods furnished as necessities, open to the jury.

Where, however, husband and wife separate by mutual consent, the terms on which the separation is made, are binding on them so long as it lasts; and if one of the terms fixes the amount of the wife's income, she has no authority to pledge her husband's credit for necessities in the event of such income proving insufficient.

This was an appeal from the Tunbridge County Court on a case stated for the opinion of the Court.

The action was brought by the plaintiff, a butcher, against the defendant, who were husband and wife, for 38*l.* for meat supplied to the wife, who at the time was living separate from her husband.

The County Court judge gave judgment in favor of the plaintiff, against the husband for the whole amount.

The husband appealed from this judgment, and on the appeal raised a question as to the rejection of evidence at the trial. The facts relating to this latter point will be found in the judgment.

Watkin Williams, Q. C., for the Appellant.

A wife has no authority to pledge her husband's credit when separated from him, such separation being by mutual consent, and arrangements as to the income of the wife suitable to the position of the parties having been made. (*Jolly vs. Ress*, 15 C. B. N. S., 628.) It is for the plaintiff to show that agency existed between the husband and wife. As to the question of evidence, it is clear from *Cobbett vs. Hudson*, (1 E. & B., 11,) that a man may be witness and advocate in the same cause. See note to *Manby vs. Scott*; (2 Smith's Leading Cases, 429.)

Kingsford, for the Respondent.

As to the second point, the judge was right in refusing the evidence of the advocate; it could only be hearsay. As to the principal question, when parties separate by consent, the question of sufficiency of allowance is for the jury. If it be not paid or inadequate, the husband is responsible for necessities supplied to the wife. This principle runs through all the decided cases. (See Addison on Contracts, 7th ed., 135;

also *Hodkinson vs. Fletcher*, 4 Camp., 70; *Hunt vs. De Blaquiere*, 5 Bing., 550; *Nurse vs. Craig*, 2 B. & P. N. R., 148; *Johnston vs. Sumner*, 3 H. & N., 261; *Biffin vs. Bignell*, 7 *Id.*, 877.)

LUSH, J., delivered the opinion of the Court.

The questions arising in this appeal are, first, whether the appellant is liable for butcher's meat supplied to his wife between the 13th of March and the 3d of October, 1877, under the circumstances stated in the case; and, secondly, whether the County Court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the appellant was, the ground of rejection being that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The appellant and his wife were married in 1850. On the 6th of January, 1876, they separated by mutual consent, the appellant taking charge of the four elder children, the three younger ones remaining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed by which she was to take and enjoy all articles of personal ornament and dress, and all property and income to which she then was or should thereafter become possessed or entitled, and the savings of all income. The appellant covenanted to pay to the trustee £5 per quarter so long as the three children, or any of them, should be under the age of twenty-one years and continue to reside with her; the wife covenanted that she would maintain and educate the children out of her separate income and the £5 per quarter, and not apply to the appellant for any further pecuniary assistance; and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the appellant had paid the £5 per quarter up to a period subsequent to the accruing of the debt in question. The respondent had never known the appellant, and had

only dealt with the wife subsequently to the deed of separation. He supplied the goods, supposing her to be a married woman, but without making any inquiries in the matter.

The only evidence on which the learned judge acted was that of the wife, (it being admitted that the goods had been supplied,) and she stated that she had been ever since the separation in receipt of her separate income, which brought in £297 15s. 2d. per annum, and the £20 a year paid by the appellant, and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held, as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the respondent in respect of the meat supplied to her. We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent authority. If she binds him, she binds him only as his agent. This is a well established doctrine. If she leaves him without cause and without his consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his house, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms, and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more,

how can any authority to claim more be implied? It is excluded by the express terms of the agreement. It is obviously immaterial whether the income is derived from the wife's separate property, or from the allowance of the husband, or partly from the one source, and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add that no third person can claim to disturb the arrangement made between the husband the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are, therefore, of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence offered should be rejected.

We do not think it necessary to go through the various cases cited. They are no guides to us, except so far as they exhibit the principles on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to show that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him. We need only to refer to the two more recent cases of *Johnston vs. Sumner*, and *Biffin vs. Bignell*.

We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them, we hold that the appellant is not liable for the debt contracted with the respondent.

Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial. We, therefore, act upon the wholesome provisions of the Judicature Act, 1875, (ord. 40. r. 10,) and direct that the judgment for the plaintiff below be set aside, and judgment be entered for the appellant.

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Current Topics.

QUITE a large accession to our already full roll of licensed attorneys has been made by the result of the examination of applicants at this term of our Supreme Court. Many of them, however, are not "young and inexperienced," having already held judicial positions and enjoyed a liberal practice. Next week we will publish the list.

WE call special attention to the opinion of Mr. Justice FIELD in the case of *Ho Ah Kow vs. Nunan*, published in this number, from an authorized copy with a full syllabus. This opinion has been published in several of the daily journals, and has been the subject of much comment. It has not been fully understood. A careful reading will show that the judgment of the Court is based upon indisputable principles. The opinion is worthy of the best attention from the further fact that it suggests what seems to us the only practical solution of the Chinese question. The argument of the Court is that the general Government alone has power to treat with the subject, and suggests that it may restrict the avocations and pursuits of the Chinese in this country to such as are practically extended to our citizens in China. This would not violate the spirit of the treaty, and inasmuch as travel and foreign commerce are the only privileges granted American citizens, such a restriction would practically exclude the hordes of Chinese from our shores without detriment to commerce.

PHOTOGRAPHS AS EVIDENCE.

In the case of *Eborn vs. Zimpelman*, (47 Tex., 503; S. C., 26, Am. Rep., 315,) on a question of the handwriting of A, in Texas, the Court admitted depositions of witnesses in another State, that they knew the handwriting of B, but not that of A. Attached to the interrogatories were photographic copies of the writings in question, purporting to have been executed by A, and the witnesses in those depositions testified to their belief that if the copies were exact, the original writings were in the hand of B. *Held*, that the depositions were erroneously received; (1) because they were secondary evidence; (2) that the mere fact that the original writings were on file in a Texas Court, and thus could not be produced to the witnesses in the other State, did not authorize their admissions; (3) because the witnesses did not know the handwriting of A. See, also, note, p. 319.

Photographs have been admitted as evidence in several classes of cases.

I. From necessity, as for example, to present accurate copies of public records which cannot be permitted to be withdrawn from the files. Thus in *In re Stephens*, (L. R., 9 C. P., 187; 8 Eng. Rep. (Moak) 481,) certain documents had been annexed to a commission returned and filed in that Court, and a *mandamus* had been issued for the examination of witnesses in the Court of Exchequer, which would involve the production of those documents; an application was made in this Court for leave to take them from the office for that purpose. The application was denied, but COLERIDGE, C. J., said that, if the identification of the handwriting became necessary, "that difficulty might be got over by taking photographic copies—a thing which is by no means uncommon at the present day." In *Leathers vs. The Salvor Wrecking Co.*, (2 Wood, 682, U. S. Cir., South. Dist., Miss.,) it was held that photographic copies of public documents on file in the public departments at Washington, which public

policy requires should not be removed, are admissible in evidence when their genuineness is authenticated in the usual way by proof of the handwriting. Within the same principle is *Daly vs. Maguire*, (6 Blatchf., 137,) an action for infringement of copyright of a play, a printed programme of a theatrical performance at San Francisco, and newspaper slips had been annexed to a deposition on file. Application was made for leave to take them from the files and annex them to a commission about to be sent in the cause to San Francisco. The application was granted on condition that their place should be supplied, under the direction of the clerk, by photographed *fac similes*. Here was no question of handwriting, and the witnesses were not to be required to inspect and swear to the *copies*, but to the *originals*. See, also, *Luco vs. U. S.*, (23 How., 515.)

II. For the purpose of identification of an individual. Thus, in the case of *Udderhook vs. Commonwealth*, (76 Penn. St., 340,) it was held that on the trial of an indictment for murder, a photograph of Goss taken in life, testified to be like a mutilated body found, was evidence to go to the jury that the body was that of Goss. Here, certainly, it was not the best evidence of which the case was capable, because witnesses could have viewed the body and testified from observation of it and acquaintance with the deceased. But there was corroborative evidence, and the Court said: "Happily the proof of identity in this case is not dependent on the photograph alone." The Court say on the general subject: "The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one

in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses." To the same effect are *Luke vs. Calhoun County*, (52 Ala., 118,) and *Ruloff vs. People*, (45 N. Y., 213.) In both these cases there was other evidences of identity, and in the latter the Court said "the photographs were competent though slight evidence in addition to the other and more reliable testimony." In *Washington Life Ins. Co. vs. Schaible*, (1 Weekly Notes of Cases, 309,) the action was on a policy of life insurance, and the defense was a breach of warranty. There was evidence that the deceased died of consumption shortly after the policy was issued. On the offer of the plaintiff a colored photograph of the deceased taken a short time before her death, which several witnesses testified was a good likeness, was admitted. The Supreme Court of Pennsylvania, on appeal, held that this was not error.

III. To identify and describe premises in dispute. In *Blair vs. Pelham*, (118 Mass., 421,) an action to recover for injuries from a defect in a highway, a photograph of the place was held admissible, when verified by proof of its correctness, to assist the jury in understanding the case. To the same effect is *Correns vs. Higgins*, (N. Y. Ct. App., 33 How. Pr., 439.) In *Church vs. Milwaukee*, 31 Wis., 512,) the action was to recover damages for an injury to plaintiff's premises by reason of the change of grade of a street, and the Court held that a photograph of the premises proved to be correct was properly admitted, it being impracticable for the jury to view the premises. COLE, J., delivering the opinion, said:

"The plaintiff had a photograph taken of the premises, which was received in evidence against the objection of the defendant. The City Engineer was present when the photograph was taken, and the plaintiff testified that the picture was as perfect as it could be. No effort was made to impeach the general correctness of the photograph, and we are really unable to perceive any valid objection to its admission in evidence. It might aid the jury in arriving at a clear and

accurate idea of the situation of the premises, and enable them the better to understand how they were affected by the change in the grade. Of course, the main thing was to bring before the minds of the jury the location of the plaintiff's lot and improvements, and all the surroundings; and this had to be done by the description of witnesses acquainted with the place, or by pictures or diagrams. If the photograph was a perfect representation of the premises, why should it not be admitted in evidence to aid the jury in determining how they were affected by the alteration of the grade? It is said, that the premises themselves were the highest evidence, and if the jury could have had a view of them, it would have greatly assisted them in passing upon the questions before them. So, undoubtedly, it would. But as a view was impracticable, the jury had to obtain the best idea they could of the location of the premises with reference to the changed grade. They were compelled to rely upon the description of witnesses, pictures and diagrams, and such means of information as they had before them. And it appears to us, that it was no violation of the rules of evidence to allow the photograph of the premises to go to the jury with the other testimony. The case of *Ruloff vs. The People*, (45 N. Y. 213,) seems to sanction the admission of such evidence, and we do not really perceive any substantial objection against it. The defendant was permitted to give in evidence a diagram or profile of the premises for the purpose of showing the general surroundings of the property; and the photograph was competent for the same purpose."

We do not see why a photograph of premises is not more trustworthy than a drawing, map or diagram.

IV. As an aid upon questions of disputed handwriting, in additions to the writings themselves. The general practice is to receive enlarged photographs of the writings, which serve to point out and emphasize peculiarities of the hands. Thus, in *Marcy vs. Barnes*, (16 Gray, 161,) magnified copies of genuine signatures of the defendant, and of the disputed signature, were submitted to the inspection of the jury. This, the Court say, "is not dissimilar to the examination

with a magnifying glass," and is an additional and useful means of making comparisons between admitted signatures, and one which is alleged to be only an imitation. So far from treating photographic copies as necessarily accurate, the Court, in that case, expressly say, that their accuracy is a question of fact "to be considered and determined by the jury." Here the enlarged photographic copies were used, not as substitutes, but in addition to the originals, and preliminary proof of the accuracy and exactness of the copies was demanded.

But even in this class of cases such evidence has not universally been tolerated. Thus, in *Matter of Will of Foster*, (34 Mich. 21,) the will being proved by the subscribing witness, the contestants proposed to furnish the jury with photographic copies. The Court said:

"If the Court had permitted photographic copies of the will to be given to the jury, with such precautions as to secure their identity and correctness, it might not, perhaps, have been error. Nevertheless, it is not always true that every photographic copy would be safe on any inquiry requiring minute accuracy. Few copies can be so satisfactory as a good photograph. But all artists are not competent to make such pictures on a large scale, and all photographs are not absolutely faithful resemblances. It is quite possible to tamper with them; and an impression which is at all blurred, would be very apt to mislead on questions of handwriting, where forgery is claimed. Whether it would or would not be permissible to allow such documents to be used, their use can never be compulsory. The original, and not the copy is what the jury must act upon, and no device can properly be allowed to supersede it. Copies of any kind are merely secondary evidence, and in this case they were intended to be used as equivalent to primary evidence in determining the genuineness of the original document. That, and that only was in controversy, and was in Court to be shown to the jury. However fortunate it may be that copies can now be produced which will closely resemble originals, it would be an unauthorized assumption to hold that Courts should be compelled to receive additional and supplementary proofs which were

neither necessary nor admissible before, and which are at best, merely convenient aids to enable juries to dispense with the primary evidence."

In *Tome vs. Parkersburgh Branch R. R. Co.*, (39 Md. 993; 17 Am. Rep. 540,) on a question of handwriting, photographic copies of the genuine writing, some of the magnified, were offered with the writing in question, and with the opinion of the photographer. The Court said: "The testimony of the photographer comes within the same principle as that of Paine. It was offered to establish the forgery of the certificates in controversy, by comparing them with copies (obtained by photographic processes, either magnified or of the natural size) of certain signatures assumed or admitted to be genuine, and pointing out the differences between the supposed genuine and disputed signatures. As a general rule, as the *media* of evidence are multiplied, the chances of error or mistake are increased. Photographers do not always produce exact *fac similes* of the objects delineated, and however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at last a mimetic art, which furnishes only secondary impressions of the original, that vary according to the lights and shadows which prevail whilst being taken." But this reasoning seems to have gone against the opinion, rather than the photograph, and seems to be to the effect, that taking photographs of a disputed signature does not render the photographer an expert on the subject of the particular signature. It is probable, however, that the photograph would have been rejected even without the accompanying opinion.

Letter-press copies have generally been rejected. (*Commonwealth vs. Eastman*, 1 Cush. 189; *Commonwealth vs. Jeffries*, 7 Allen, 561; *Wilkins vs. Earle*, 44 N. Y., 172; S. C., 4 Am. Rep. 655.) In the last case the Court said: "We are of the opinion, that they were not in any sense original papers, and were in their character copies to the same extent that other copies carefully compared would have been." If this reasoning is sound, a photographic copy cannot be much relied on for correctness; and indeed, it must be confessed, that photographs sometimes lie as grossly as "figures." In

respect to letter-press copies, it is a little troublesome to discover the objection to them where there is no question of genuineness of handwriting, but where the object is simply to introduce the contents of an undisputed document or letter.

In the Texas case, counsel made an ingenious argument for the admission of the photographs, in the course of which he remarked:

"Every object seen with the natural eye, is only seen because photographed on the retina. In life the impression is transitory; it is only when death is at hand that it remains permanently fixed on the retina. Thus, we are secure in asserting, that no witness ever swore to a thing seen by him without swearing from a photograph. What we call sight, is but the impression made on the mind through the retina of the eye, which is nature's camera. Science has discovered that a perfect photograph of an object, reflected in the eye of one dying, remains fixed on the retina after death. (See recent experiments stated by Dr. Vogel in the May number, 1877, of *Philadelphia Photographic Journal*.) Take the case of a murder committed on the highway; on the eye of the victim is fixed the perfect likeness of a human face. Would this Court exclude the knowledge of that fact from the jury, on the trial of the man against whom the glazed eye of the murdered man thus bore testimony? In other words, would a living eye-witness, whose memory only preserved the fleeting photograph of the deed be heard, and the permanent photograph on the dead man's eye be excluded? We submit that the eye of the dead man would furnish the best evidence that the accused was there when the deed was committed, for it would bear a fact, needing no effort of memory to preserve it. It would not be parol evidence based on uncertain memory, but the handwriting of nature, preserved by nature's camera."

The natural photographs spoken of, we imagine, are more fanciful than real. We have never yet heard of a case where the dead man's eye bore the likeness of the last man on whom he looked. But if it were so, it would only prove that the process of nature is more exact and trustworthy than that of the camera.—*Alb. Law Journal*.

THE INVALIDITY OF THE "QUEUE ORDINANCE" OF THE CITY
AND COUNTY OF SAN FRANCISCO.

Circuit Court of the United States,

DISTRICT OF CALIFORNIA.

HO AH KOW vs. MATTHEW NUNAN.

1. The Board of Supervisors of the city and county of San Francisco, the body in which the legislative power of the city and county is vested, is limited in its authority by the act which consolidated the government of the city and county, generally known as the Consolidation Act. It can do nothing unless warrant be found for it there, or in a subsequent statute of the State.
2. The power of the Board to determine the fines, forfeitures and penalties which may be incurred, is limited to two classes of cases: 1st, breaches of regulations established by itself; and, 2d, violations of provisions of the consolidation act, where no penalty is provided by law. It can impose no penalty in any other case; and when a penalty other than that of fine or forfeiture is imposed, it must, by the terms of the act, be in the form of imprisonment.
3. The general supervision of all matters appertaining to the sanitary condition of the county jail in San Francisco is confided by the act of April 4th, 1870, to the Board of Health of the city and county.
4. Accordingly, where an ordinance of the city and county of San Francisco, passed on the 14th of June, 1876, declared that every male person imprisoned in the county jail, under the judgment of any Court having jurisdiction in criminal cases in the city and county, should immediately upon his arrival at the jail, have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and made it the duty of the Sheriff to have this provision enforced it was *Held*, that the ordinance was invalid, being in excess of the authority of the Board of Supervisors, whether the measure be considered as an additional punishment to that imposed by the Court upon conviction under a State law, or as a sanitary regulation; and constituted no justification to the Sheriff acting under it.
5. The ordinance being directed against the Chinese only imposing upon them a degrading and cruel punishment, is also subject to the

further objection, that it is hostile and discriminating legislation against a class forbidden by that clause of the Fourteenth Amendment to the Constitution, which declares that no State "shall deny to any person within its jurisdiction the equal protection of the laws." This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments; and to the subordinate legislative bodies of its counties and cities.

6. The equality of protection thus assured to every one whilst within the United States, implies not only that the Courts of the country shall be open to him on the same terms, as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice, he shall suffer for his offences no greater or different punishment.
7. The legislation of Congress carrying out the provisions of the Fourteenth Amendment in accordance with these views cited.
8. While statements of Supervisors in debate on the passage of an ordinance cannot be resorted to for the purpose of explaining the meaning of the terms used, they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied.

Mr. Justice FIELD delivered the opinion of the Court.

The plaintiff is a subject of the Emperor of China, and the present action is brought to recover damages for his alleged maltreatment by the defendant, a citizen of the State of California and the Sheriff of the city and county of San Francisco. The maltreatment consisted in having wantonly and maliciously cut off the queue of the plaintiff, a queue being worn by all Chinamen, and its deprivation being regarded by them as degrading and as entailing future suffering.

It appears that in April, 1876, the Legislature of California passed an act "concerning lodging-houses and sleeping-apartments within the limits of incorporated cities," declaring, among other things, that any person found sleeping or lodging in a room or an apartment containing less than five hundred cubic feet of space in the clear for each person occupying it, should be deemed guilty of a misdemeanor, and on conviction thereof be punished by a fine of not less than

ten or more than fifty dollars, or imprisonment in the county jail, or by both such fine and imprisonment.* Under this act the plaintiff, in April, 1878, was convicted and sentenced to pay a fine of ten dollars, or in default of such payment to be imprisoned five days in the county jail. Failing to pay the fine he was imprisoned. The defendant, as Sheriff of the city and county, had charge of the jail, and during the imprisonment of the plaintiff cut off his queue as alleged. The complaint avers, that it is the custom of Chinamen to shave the hair from the front of the head and to wear the remainder of it braided into a queue; that the deprivation of the queue is regarded by them as a mark of disgrace, and is attended, according to their religious faith, with misfortune and suffering after death; that the defendant knew of this custom and religious faith of the Chinese, and knew also that the plaintiff venerated the custom and held the faith; yet, in disregard of his rights, inflicted the injury complained of; and that the plaintiff has, in consequence of it, suffered great mental anguish, been disgraced in the eyes of his friends and relatives, and ostracised from association with his countrymen; and that hence he has been damaged to the amount of \$10,000.

Two defenses to the action are set up by the defendant; the second one being a justification of his conduct under an ordinance of the city and county of San Francisco. It is upon the sufficiency of the latter defense that the case is before us. The ordinance referred to was passed on the 14th of June, 1876, and it declares that every male person imprisoned in the county jail, under the judgment of any Court having jurisdiction in criminal cases in the city and county, shall immediately upon his arrival at the jail have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and it is made the duty of the Sheriff to have this provision enforced. Under this ordinance the defendant cut off the queue of the plaintiff.

The validity of this ordinance is denied by the plaintiff on two grounds: 1st, that it exceeds the authority of the Board

* Session Laws of 1875-6, p. 759.

of Supervisors, the body in which the legislative power of the city and county is vested; and, 2d, that it is special legislation imposing a degrading and cruel punishment upon a class of persons who are entitled, alike with all other persons within the jurisdiction of the United States, to the equal protection of the laws. We are of opinion that both these positions are well taken.

The Board of Supervisors is limited in its authority by the act consolidating the government of the city and county. It can do nothing unless warrant be found for it there or in a subsequent statute of the State. As with all other municipal bodies, its charter—here the consolidation act—is the source and measure of its powers. In looking at this charter, we see that the powers of the Board, and the subjects upon which they are to operate are all specified. The Board has no general powers, and its special power to determine the fines, forfeitures and penalties which may be incurred is limited to two classes of cases: 1st, breaches of regulations established by itself; and, 2d, violations of provisions of the consolidation act, where no penalty is provided by law. It can impose no penalty in any other case; and when a penalty other than that of fine or forfeiture is imposed, it must, by the terms of the act, be in the form of imprisonment. It can take no other form. "No penalty to be imposed," is the language used, "shall exceed the amount of one thousand dollars, or six months imprisonment, or both." The mode in which a penalty can be inflicted, and the extent of it, are thus limited in defining the power of the Board. In their place nothing else can be substituted. No one, for example, would pretend that the Board could, for any breach of a municipal regulation or any violation of the consolidation act, declare that a man should be deprived of his right to vote, or to testify, or to sit on a jury, or that he should be punished with stripes, or be ducked in a pond, or be paraded through the streets, or be seated in a pillory, or have his ears cropped or his head shaved.

The cutting off the hair of every male person within an inch of his scalp, on his arrival at the jail, was not intended

and cannot be maintained as a measure of discipline or as a sanitary regulation. The act by itself has no tendency to promote discipline, and can only be a measure of health in exceptional cases. Had the ordinance contemplated a mere sanitary regulation, it would have been limited to such cases and made applicable to females as well as to males, and to persons awaiting trial as well as to persons under conviction. The close cutting of the hair which is practiced upon inmates of the State Penitentiary, like dressing them in striped clothing, is partly to distinguish them from others, and thus prevent their escape, and facilitate their recapture. They are measures of precaution, as well as parts of a general system of treatment prescribed by the Directors of the Penitentiary under the authority of the State, for parties convicted of and imprisoned for felonies. Nothing of the kind is prescribed or would be tolerated with respect to persons confined in a county jail for simple misdemeanors, most of which are not of a very grave character. For the discipline or detention of the plaintiff in this case, who had the option of paying a fine of ten dollars, or of being imprisoned for five days, no such clipping of the hair was required. It was done to add to the severity of his punishment.

But even if the proceeding could be regarded as a measure of discipline, or as a sanitary regulation, the conclusion would not help the defendant; for the Board of Supervisors had no authority to prescribe the discipline to which persons convicted under the laws of the State should be subjected, or to determine what special sanitary regulations should be enforced with respect to their persons. That is a matter which the Legislature had not seen fit to intrust to the wisdom and judgment of that body. It is to the Board of Health of the city and county that a general supervision of all matters appertaining to the sanitary condition of the county jail is confided; and only in exceptional cases would the preservation of the health of the institution require the cutting of the hair of any of its inmates within an inch of his scalp.*

* Act of April 4, 1870. Session Laws of 1869-70, p. 717.

The claim, however, put forth that the measure was prescribed as one of health, is notoriously a mere pretense. A treatment to which disgrace is attached, and which is not adopted as a means of security against the escape of the prisoner, but merely to aggravate the severity of his confinement, can only be regarded as a punishment additional to that fixed by the sentence. If adopted in consequence of the sentence, it is punishment in addition to that imposed by the Court; if adopted without regard to the sentence, it is wanton cruelty.

In the present case, the plaintiff was not convicted of any breach of a municipal regulation, nor of violating any provision of the consolidation act. The punishment which the Supervisors undertook to add to the fine imposed by the Court was without semblance of authority. The Legislature had not conferred upon them the right to change or add to the punishments which it deemed sufficient for offenses; nor had it bestowed upon them the right to impose in any case a punishment of the character inflicted in this case. They could no more direct that the queue of the plaintiff should be cut off than that the punishments mentioned should be inflicted. Nor could they order the hair of any one, Mongolian or other person, to be clipped within an inch of his scalp. That measure was beyond their power.

The second objection to the ordinance in question is equally conclusive. It is special legislation, on the part of the Supervisors, against a class of persons, who, under the constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only for the Chinese in San Francisco. This was avowed by the Supervisors on its passage, and was so understood by every one. The ordinance is known in the community as the "Queue Ordinance," being so designated from its purpose to reach the queues of the Chinese, and and it is not enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in

order to enforce the payment of a fine imposed upon him it is necessary that torture should be superadded to imprisonment. Then, it is said, the Chinaman will not accept the alternative which the law allows, of working out his fine by his imprisonment, and the State or county will be saved the expense of keeping him during the imprisonment. Probably the bastinado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible.

The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of Supervisors in debate on the passage of the ordinance, cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so the most important provisions of the Constitution, intended for the security of personal rights, would, by the general terms of an enactment, often be evaded and practically annulled. (*Brown vs.*

Piper, 1 Otto., 42; *Ohio Loan and Trust Co. vs. Debolt*, 16 How. 435.) The complaint in this case shows that the ordinance acts with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them. Upon the Chinese prisoners its enforcement operates as "a cruel and unusual punishment."

Many illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them. We have, for instance, in our community a large number of Jews. They are a highly intellectual race, and are generally obedient to the laws of the country. But, as is well known, they have peculiar opinions with respect to the use of certain articles of food, which they cannot be forced to disregard without extreme pain and suffering. They look, for example, upon the eating of pork with loathing. It is an offense against their religion, and is associated in their minds with uncleanness and impurity. Now, if they should, in some quarter of the city, overcrowd their dwellings, and thus become amenable, like the Chinese, to the act concerning lodging-houses and sleeping-apartments, an ordinance of the Supervisors requiring that all prisoners confined in the county jail should be fed on pork, would be seen by every one to be leveled at them; and, notwithstanding its general terms, would be regarded as a special law in its purpose and operation.

During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and restrictions upon Catholics; but that legislation has since been regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated.

But, in our country, hostile and discriminating legislation by a State against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the

fourteenth amendment of the Constitution. That amendment in its first section declares who are citizens of the United States, and then enacts that no State shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no State shall deprive *any person* (dropping the distinctive term citizen) of life, liberty, or property, without due process of law, nor deny to *any person* the equal protection of the laws. This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments; and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the Courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts; but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment.

Since the adoption of the fourteenth amendment, Congress has legislated for the purpose of carrying out its provisions in accordance with these views. The Revised Statutes re-enacting provisions of law passed in 1870, declare that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to *no other*." (Sec. 1977.) They also declare, that "every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or

other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Sec. 1979.)

It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is "caught upon the broad shield of our blessed Constitution and our equal laws."*

We are aware of the general feeling—amounting to positive hostility—prevailing in California against the Chinese, which would prevent their further immigration hither, and expel from the State those already here. Their dissimilarity in physical characteristics, in language, manners, and religion would seem, from past experience, to prevent the possibility of their assimilation with our people. And thoughtful persons, looking at the millions which crowd the opposite shores of the Pacific, and the possibility at no distant day of their pouring over in vast hordes among us, giving rise to fierce antagonisms of race, hope that some way may be devised to prevent their further immigration. We feel the force and importance of these considerations; but the remedy for the apprehended evil is to be sought from the general government, where, except in certain special cases, all power over the subject lies. To that government belong exclusively the treaty making power, and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic, and, with the exceptions presently mentioned, the power to prescribe the conditions of immigration or importation of persons. The State in these particulars, with those exceptions, is powerless, and nothing is gained by the attempted assertion of a control which can never be admitted. The State may exclude from its limits paupers and convicts of other countries, persons incurably

* Judge Black's argument in the *Fossat* case, 2 Wallace, p. 703.

diseased, and others likely to become a burden upon its resources. It may perhaps also exclude persons whose presence would be dangerous to its established institutions. But there its power ends. Whatever is done by way of exclusion beyond this must come from the general government. That government alone can determine what aliens shall be permitted to land within the United States, and upon what conditions they shall be permitted to remain; whether they shall be restricted in business transactions to such as appertain to foreign commerce, as is practically the case with our people in China, or whether they shall be allowed to engage in all pursuits equally with citizens. For restrictions necessary or desirable in these matters, the appeal must be made to the general government; and it is not believed that the appeal will ultimately be disregarded. Be that as it may, nothing can be accomplished in that direction by hostile and spiteful legislation on the part of the State, or of its municipal bodies, like the ordinance in question—legislation which is unworthy of a brave and manly people. Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation.

The plaintiff must have judgment on the demurrer to the defendant's plea of justification; and it is so ordered.

FIELD,

Presiding Justice.

SAWYER,

Circuit Judge.

San Francisco, July 7th, 1879.

Recent Decisions.

STATUTE OF LIMITATIONS.

- *Part payment by Joint Maker.*—Payments of interest and of part of the principal of a promissory note, and which were endorsed thereon by one of the joint makers before the said note was barred by the statute of limitations, do not deprive the other joint maker of his defense under the statute where the latter had no knowledge of such payments and had not assented thereto. The Court said: "It is now well understood that the mere acknowledgment of a debt is not sufficient to take it out of the statute. There must be circumstances from which a new promise may be presumed. The debt is no longer demandable and there must be a new promise, either express or implied, in order to revive it. The acknowledgment must be accompanied by expressions showing a willingness to pay it. Such is the current of the modern decisions, and this new promise is now the real cause of action where the statute has otherwise run upon the demand. Now, can it be possible that a joint contractor, by his own act and at his own pleasure and without the knowledge or consent of his co-contractor, can enter into a new liability which will be binding upon them both? To state this proposition is to refute it. Nor in the principle can it make any difference whether the payment claimed to revive the liability was made before or after the statute had attached. In other words, a joint contractor is not an agent for the others unless there is an arrangement to that end, and cannot bind the contractors without their consent." (*Citing Bell vs. Morrison*, 1 Pet. 351; *Van Keuren vs. Parmelee*, 2 N. Y. 525; *Shoemaker vs. Benedict*, 11 id. 176; *Dean vs. Hewit*, 5 Wend. 257; *Tompkins vs. Brown*, 1 Denio, 247, Sup. Ct., District of Columbia, 1879; *Miller vs. Miller*.) Opinion by MACARTHUR, J.

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Current Topics.

IN *State vs. Northup*, (13 West. Jurist, 306,) the Supreme Court of Iowa decided that on a criminal trial evidence of the good character of the accused is always for the consideration of the jury, and that it is for them to determine its weight without any instructions from the Court, and if such evidence creates a reasonable doubt in their minds of the guilt of the accused, it is their duty to acquit. It was formerly the rule, that evidence of good character was admissible only in capital cases; but the rule is now settled, that such evidence is admissible in all criminal cases. (3 Greenl. Ev., § 25.) But the authorities are not agreed as to the effect of such evidence, that is, whether it should be considered in all cases or only in doubtful cases. (In *Starkie on Ev.* 73, 10th Am. ed.,) it is said that good character ought never to have any weight, except in doubtful cases, and this opinion is repeated in the note of the learned editor. The same view was expressed in 1 *Phillips on Ev.*, 469. On the other hand, *Greenleaf* takes the ground, that the jury should consider such evidence in every case, and give to it its due weight. (3 *Greenl. on Ev.*, § 25;) and this view accords with that expressed in (2 *Russ. on Crimes*, 785-786. 1 *Bishop's Criminal Procedure*, § 488, and *Bennett and Heard's Notes to 2 Leading Criminal Cases*, 351.) Neither *Roscoe* nor *Wharton* has given his individual views, but they have apparently adopted those expressed by *Sir William Russell*.

(Roscoe's Crim. Ev., 76; American Crim. Law, §§ 643-644.) The leading adjudicated case, in favor of the rule that such evidence cannot avail the defendant, except in a doubtful case, is the *Commonwealth vs. Webster*, (5 Cush., 295.) See also, as being in accord therewith, (*The State vs. Wells*, 1 Coxe, 424; *United States vs. Roudenbush*, Baldwin, 514; *The People vs. Hammel*, 2 Parker, 223; *The People vs. Cole*, 4 id., 35; *United States vs. Smith*, 2 Bond, 323.) In *Stephens vs. The People*, (4 Parker, 396,) and *Lowenberg vs. The People*, (5 id., 414,) the jury was instructed that good character might raise the doubt entitling the persons to an acquittal, and the weight to be given thereto was for the jury in each case. The defendants having been found guilty in each case, no point was raised, as we understand, in the appellate Court as to the validity of the instructions. The doctrine announced in the *Webster case* has been disapproved and condemned in (*Cancemi vs. The People*, 16 N. Y., 501; *The People vs. Ashe*, 44 Cal., 288; *The People vs. Garbett*, 17 Mich., 9; *Harmington vs. The State*, 19 Ohio St., 264.) The rule of these cases is sustained by (*The State vs. Henry*, 5 Jones, N. C., 665; *Jupety vs. The People*, 34 Ill., 516; *The State vs. McMurphey*, 52 Mo., 251; *United States vs. Whitaker*, 6 McLean, 342; *Commonwealth vs. Casey*, 3 Brewster, 414; *Epps vs. The State*, 19 Ga., 102; *Filed vs. The State*, 18 Ala., 720; *Carson vs. The State*, 50 id., 134; *Ryan vs. The People*, 18 Abb. Pr., 232.

WE contemplate publishing all the opinions of our Supreme Court omitted from the regular official reports, beginning at the date of our first volume—Sept. 1, 1877, and running back until we have collated enough for a volume. These opinions are of great value to the practitioner. We would be glad to have an expression of opinion from our subscribers as to the value of such a publication.

LAWYERS IN THE LEGISLATURE.

We read in a writ of summons, in the fifth year of Henry IV, "the King willed that neither you, nor any other sheriff (*vice-comes*) of the Kingdom, or any apprentice, nor other man following the law, should be chosen." "This prohibition," says Coke, "was inserted in virtue of an ordinance of the Lords, made in the forty-sixth year of Edward III; and by reason of its insertion, this parliament was fruitless, and never a good law made thereat, and therefore called *Indoctum parliamentum*, or lack-learning parliament. Since this time," he adds, "lawyers (for the great and good service of the commonwealth,) have been eligible." And yet, to this day, there survives an old-fashioned and most unreasonable prejudice against the election of lawyers as parliamentary representatives, which, apart from either politics or polemics, would justify us in bespeaking fair-play for any candidate who happened to be connected with the legal profession. With politics and polemics we have nothing to do; but it is only right that, when a member of the legal profession seeks the suffrages of a constituency, we should deprecate a prejudice detrimental to the interests of the profession generally, while calculated to impede "the great and good service of the commonwealth," which it is now more than ever in the power and directly within the province of legal members of the legislature to effect. It is a time of changes many and momentous in matters needing the most watchful supervision of lawyers—not that the legal profession alone is vitally affected, but that every subject in the land is vitally affected in his person or property by measures which have been already projected for good or for evil, and which for good or for evil will largely depend on the legal skill that is brought to bear on their provisions. It is a time when, whether the government be Conservative or Liberal, change is the order of the day, and when the lawyer, whether he be Conservative or Liberal, is best able to render "great and good service to the commonwealth." And instead of rejecting the lawyer merely because he is a lawyer, it should be

considered, that for this very reason, he can do service great and good. Again, none so much as he comes into such public and hostile contact with all classes and ranks of society; it is his pursuit to expose dishonesty and crime; the witness dreads him—the suitor recoils from him. But neither should the prejudice hence arising affect the choice of a parliamentary representative; rather it should be deemed, that by reason of his very familiarity with the legal aspects of vice and folly, his is the voice to guide, and his the pen to prescribe the legislation that vice and folly has rendered necessary. Tested he should be in many ways; but when he is to be judged of as a lawyer merely, apart from politics or polemics, the truest test is the estimate of his fitness formed by his own profession.

Mr. Peter O'Brien, who has just addressed the electors of Clare, has already achieved distinction at the Bar—he is a sound practical lawyer, a fearless and persuasive advocate. If law and logic carry weight in the House, he will not be found wanting; and if they be insufficient to create a proper impression on that assembly, he has only to follow Mr. Wilkes' advice: "Be as impudent as you can, and as merry as you can, and say whatever comes uppermost." But with his political principles we have nothing to do; and were they diametrically opposite to those he maintains, we should still have accorded our present voluntary testimony to the worth of an upright and able lawyer, who, whether he wins the suffrages of Clare or not, has well won the good-will and high opinion of the profession.—*Irish Law Times*.

HOW TO EXPLORE FOR MINERALS.

Mr. J. E. Clayton, mining engineer, contributes to the Salt Lake (Utah) *Tribune*, the following items on prospecting for minerals:

1. Examine the gravel and boulders of the mountain streams, and note carefully the structure and character of the gravel wash. This will reveal the geological formations that

are intersected by the stream. Try the sands at the head of the gravel bars for free gold, or for any crystallized minerals, etc. If the structure of the quartz boulders or other vein stodes are favorable, go up the stream until the geological zone is found that has produced the quartz or other metal-bearing minerals. Then follow the supposed metal-bearing zone on its line of strike and make especially-careful examinations wherever eruptive dikes are found intersecting the formation.

2. When a lode or vein is found, note carefully its relation to the country rock, especially any differences in the opposite walls of the vein. Then follow it on the line of outcrop, and note carefully those points where the best ores are seen, so as to determine the position of the best ore-chutes before making any location on the lode.

3. The first work should consist of shallow cuts across the lode at intervals of 50 to 100 feet; or, if the vein is small and partially covered by soil and debris, a trench along the line of outcrop is preferable. If the surface tracing is satisfactory and the true line of strike has been determined, then survey your claim and stake off the boundaries according to the requirements of the¹United States laws.

4. The work of exploring the vein underground is the next thing in order. To do this intelligently, you must select that point on the line of outcrop where the best ore is found, then sink a shaft on the lode following the angle of dip, keeping both foot wall and hanging wall exposed if possible. If the lode is too wide for this to be done, then follow the best ore streak of the vein itself, and at every fifty feet in depth make cross-cuts to the walls of the vein. After 100 feet deep has been reached, run levels each way from the shaft on the line of the vein, in order to determine the extent or spread of the ore-chute or chimney on the horizontal line. When the limit of the ore body on the horizontal line has been ascertained, then sink 100 feet more, and drift right and left, as before. If more than one chimney of ore is found on the line of the vein, a shaft should be sunk on it and drifts run as above stated, being careful to confine all

the exploring work within the walls of the vein itself. When enough has been done to prove the character, size and quality of the vein, it will then be time to determine the position, character and extent of the "dead work" necessary to work the mine to the deep. These questions should be settled by careful surveys, made in the light of all the local facts and surroundings, such as the geological structure of the country rock, the probable amount of water to be raised, the lowest point of drainage by adit, or level, and the most convenient point for delivery of the ores to the surface, etc.

The last part of the preliminary exploration of any mine is to determine, by actual tests, what are the best methods of reduction, and the extent and kind of reduction works needed, etc.

5. After all these preliminary facts have been thoroughly ascertained and clearly defined, the unavoidable risks of mining will have been fully met and overcome. All subsequent operations are simply matters of skill and business management, and the capitalizing of the mine becomes a mere matter of business detail.

The requirements are as follows:

1. The preliminary exploration must have ore enough cut and under-run, or otherwise exposed, to give at least two years' work for reduction works of an extent sufficient for the average annual output of ore.

2. The reduction works must be suited for the best treatment of the ore.

3. The exploration of the mine must be pushed ahead of extraction of ore, so as to expose at least one ton of ore in new ground, for every ton extracted from the previously explored ground.

4. Before erecting reduction works, the ore exposed in the mine should be so thoroughly tested as to guarantee a net profit sufficient to pay the whole cost of such works.

5. The mine being well opened, and the reduction works, or plant, established, the general success of the enterprise must depend upon the efficiency of the general business management.—*Copp's Land Owner.*

Supreme Court of the United States.

MAY, 1879. 98 U. S.

DENVER vs. ROANE, EXECUTOR.

1. **PARTNERSHIP—DEATH OF PARTNER—ACCOUNTING—DISCOVERY.** The personal representatives of a deceased partner may by a bill in equity compel the surviving partners to account for the partnership property, and for a discovery of the property. And so far as any money has been earned, which is divisible, a decree will be entered directing the payment of the proportion due decedent.
2. **IBID—CONSTRUCTION OF AGREEMENT—ATTORNEYS AT LAW—COMMERCIAL PARTNERSHIPS—DISTRIBUTION OF PROFITS.** Attorneys at law formed a partnership which was dissolved upon the agreement that the unfinished business should be conducted and closed by the former partners under the terms of the partnership agreement, and upon the further agreement that in case of the death of any of the partners that his heirs or representatives should receive a certain proportion of the fees earned. *Held*, 1, That a partnership between attorneys at law, or between agents collecting claims, are controlled by the same principles of law as are commercial partnerships. 2. That where there is no provision to recompense surviving partners for services in conducting the remaining business of the firm, when it is provided that the estate of a deceased partner shall participate in the profits, the interest of the deceased partner shall be fully paid to his representatives.
3. **IBID—ATTORNEYS AT LAW—REFUSAL OF PARTNER TO CONTINUE IN CAUSE—INTEREST IN FEES.** The refusal of an attorney at law to continue with his partners in the prosecution of a cause will deprive him of any part of the fees earned subsequent thereto.

Appeal from the Supreme Court of the District of Columbia.

Bill for a partnership accounting. James Hughes, the complainant's testator, and James W. Denver and Charles F. Peck were in partnership as attorneys and counselors at law from 1866 until the 18th of March, 1869. On that day it was agreed between them virtually that the general partnership should terminate; that thereafter no new business should be received in partnership, and that any coming to the firm through the mails should be equitably divided. The agreement, however, contained a stipulation that the business of the firm theretofore received and then in hand should be

closed up as rapidly as possible by the members of the firm "as partners, under their original terms of association and in the firm name." Soon after, on the 13th of August, 1869, a further agreement was made to the effect that in case of death of any one of the partners, his heirs or personal representatives, or their duly authorized agent, should receive one third of the fees in cases nearly finished, and twenty-five per cent. in other partnership cases. Denver acceded to this second agreement, with the understanding that before any such division should be made, at any time, all partnership obligations should be first satisfied, proposing no new terms, only stating the legal effect. It is upon these two agreements the bill is founded. Mr. Hughes died on the 21st of October, 1873, and the executor of his will has brought the present suit for a discovery, and to recover from the surviving partners the share of the testator in the fees received by them out of the partnership business which remained unfinished when the general partnership was dissolved. A decree was entered against the defendants in the Court below, and they appealed.

Albert Pike and John W. Denver, for Appellants.

Joseph Bradley and S. H. Henkle, for Respondent.

STRONG, J. (*After stating the facts.*) It is first insisted by the appellant that the Court below had no competency or jurisdiction to entertain a bill for such relief as is prayed for, nor to give such a decree as the Court gave, whereby it attempts to settle and close the affairs of a partnership by decreeing specific sums as legally due, and, if so, demandable at law, and providing for the further continuance of the partnership and collection by virtue of its decree of other like sums until the business of the partnership may end. Such is the first assignment of error. The objection misapprehends the nature of the case made by the bill, overlooks the facts, and does not state accurately the decree. That a bill in equity may be maintained by the personal representatives of a deceased partner against the survivors to compel an account, so far as an account is possible, and for a discovery of the partnership property which came to

their hands, is undeniable, and such was the object of the present bill. When the firm was dissolved, in March, 1869, for general purposes, the agreement of dissolution stipulated that, as to the business then in hand, the members of the firm should continue partners, and should close it up. What that business was the present defendants only could know after the death of Hughes, for it was then left in their hands, and they only could know what fees had been received on account of it. A bill for discovery, as well as for distribution of the fees received, was, therefore, plainly within the province of a Court of Equity. And as the partners had agreed, as they did by the agreement of August, 1869, to divide those fees in certain proportions, it was quite competent for the Court to enforce a fulfilment of the contract, so far as possible, when the decree was made. The Court did not attempt to make a complete settlement of the affairs of the partnership. In the nature of the case that was impossible. Some of the partnership business remained unfinished, and fees uncertain in amount were yet to be collected. But so far as fees had been collected, the right to immediate distribution was complete. The agreement did not contemplate that all the fees collected might be held by the surviving partners until after the partnership business should be brought to an end, and it was, therefore, quite proper to reserve consideration of the fees yet to be received after they shall have been earned. An objection raised by several other assignments of error (particularly the 6th, 7th, 8th, 9th, 18th and 19th) is, in substance, that the Court erred in applying to a partnership between lawyers and claim agents the principles of the law of commercial partnerships, in regard to the modes of settlement of the same after the death of a partner, and in regard to the neglect of the business of such a firm by a partner; that by the decree no compensation is allowed to the survivors for carrying on the unfinished business, but that they are required to continue it as well for themselves as for the benefit of the deceased partner's estate. We think these objections to the decree ought not to be sustained. We are not convinced that dur-

ing his life Mr. Hughes (except perhaps in reference to a single case in charge of the firm) was guilty of such neglect, or violation of his duty to his partners, as should deprive him, or his personal representative, of a right to share in the profits of the partnership. In regard to the work done and the fees received after his death, the parties, by their agreements, prescribed the rule for determining their rights as against each other. Having jointly undertaken the business intrusted to the partnership, all the parties were under obligation to conduct it to the end. This duty they owed to the clients and to each other. And as to the unfinished business remaining with the firm on the 18th day of March, 1869, the duty continued. The agreement provided for that. Now, in reference to this duty the law is clear. "As there is an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern, it follows, that he must do it without any rewards or compensation, unless there be an express stipulation for compensation." (Story on Partn., §§ 182, 331; *Colwell vs. Leiber*, 7 Paige, 483.) So it is held that where partnerships are equal, as was true in the present case, and there is no stipulation in the partnership agreement for compensation to a surviving partner for settling up the partnership business, he is entitled to no compensation. (*Brown vs. McFarlan*, 41 Penn. St., 129; *Beatty vs. Wray*, 19 *Ib.*, 518; *Johnson vs. Hartshouse*, 52 N. Y., 173.) This is the rule in regard to what are commonly called commercial partnerships, and the authorities cited refer to those. There may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor. No adjudicated cases, however, with which we are acquainted, recognize any such distinction. And in the present case, as we have said, the parties made arrangements for the work and results of work after the death of any of their number. The agreement of August 13, 1869, provided that in case of the death of any partner,

one third of the fees in cases nearly finished, and one quarter of the fees in other partnership cases, should belong to the representatives of the decedent. Of course, it was contemplated that the surviving partners should finish the work, and that no allowance should be made to them beyond the share of the fees specified in the agreement.

The most important objection to the decree which has been urged by the appellant is, that it adjudged to the complainant one third of the fee collected by the defendants in the case of *Gaaway B. Lamar* against *The United States*, including the claim of D. A. Martin. That case was in charge of the firm before the agreement of March 18, 1869, was made, and was commenced in 1868. It was, therefore, one of the cases within the purview of the agreement of August 13, 1869. Mr. Hughes's name appeared on the record as attorney and counsel, with the appellants, for the claimant. But on the 9th of January, 1873, he came into Court and asked that his name be erased as such attorney, and that he have leave to withdraw his appearance and sever his connection with the cause. His motion was allowed, and his appearance was then withdrawn. The appellants, however, went on with the case. Briefs were filed for the claimant on the 21st of March and the 22d of April, 1873; the case was argued on the 20th of May, and on the 2d of June next following the Court entered a judgment for the claimant. An appeal was then taken to this Court which was subsequently dismissed. After the withdrawal of his appearance and the severance of his connection with the cause, Mr. Hughes took no part in prosecuting the claim, neither in the Court of Claims nor in the Supreme Court, and he paid no attention to it. He quarrelled with Mr. Lamar, and about the time he withdrew from the cause he denounced the claim privately to one of the judges of the Court of Claims as altogether without merit and a fraudulent case, or words to that effect, and said that he had decided not to be involved in a case of so scandalous a character, and for so worthless or unworthy a client. In regard to the question of fees in the case, the judge testifies, "he declined to have any interest in the case,

or to take fees, because he believed the case was a corrupt one, and not likely to succeed, and that he would not lose much by his withdrawal from the case." The question presented by this state of facts is, whether, inasmuch as the case was afterward conducted by the appellants to final success, and they received a fee from Mr. Lamar, the claimant, Mr. Hughes, would be entitled to any part of the fee were he now living? If not, certainly his personal representative cannot be now. The recovery of the claim was undertaken by the firm without any agreement respecting fees. By undertaking it, the firm and each member of it assumed to conduct the case to a final conclusion, and with all fidelity to the client. Such was the contract of Mr. Hughes with Lamar, as completely as if he had been the sole attorney and counsel employed. And as the contract was entire, he could not have abandoned it after a partial performance, and still have held the other party bound. Much less could he have accompanied his abandonment by denouncing the honesty of the claim to one of the judges of the Court, whose province it was to find the facts and adjudicate upon its merits, and yet claim compensation for services rendered. Such conduct on his part was not merely a renunciation of his engagement to his client. It was a flagrant breach of professional duty. It was not in his power to refuse performance of his part of the implied contract with Lamar, take action hostile to the claim, and still hold Lamar bound. Certainly, he could not hold Lamar directly liable. And we do not perceive that, in equity, his situation is any better because he had contracted with the client jointly with his copartners. If, then, by abandoning the case and denouncing it as fraudulent, he lost all the right which he had against Lamar, how can he claim from his copartners any of the compensation they obtained for conducting the case, after his abandonment, to final success? His action was a breach of his duty to those partners, as well as of his obligation to Lamar. By the agreement of copartnership he had undertaken to share in the labor, and to promote the common interests of the firm, and that was the foundation of his right to share in its

earnings. It may be, that mere neglect of his duty would not have extinguished that right; but a repudiation of his obligations, refusing to act as a partner, or to perform the functions of a partner, is quite a different thing. It may well be considered as a repudiation of the partnership. It was said in *Wilson vs. Johnstone*, (16 Eq. Cas., 606,) "He who acts so as to treat the articles as a nullity as it regards his own obligations, cannot complain if they are so treated for all purposes." It may, therefore, very justly be held that by his action Mr. Hughes became a stranger to the case, and repudiated any relation he had previously held to it as a partner in the firm. The partnership ceased as respects that claim. The other partners who continued to attend to the case could charge the client nothing for his services, for as the contract was contingent on success, nothing was due to any partner until success was attained. They certainly could claim nothing for services rendered by him, after he severed his connection with the case, for he rendered none, and if he had any just claim on a *quantum meruit* for services rendered before, it was against Lamar, and not against his co-partners. We think, therefore, the decree of the Court below was erroneous, in so far as it allowed to the complainant any part of the fee collected from Lamar, or from Martin, who owned a part of what was recovered in the Lamar suit. We discover no other fault in the decree, but for this the case must be sent back for correction.

Decree reversed, with instructions to enter a decree in conformity with this opinion.

Supreme Court of Iowa.

1878. 47 IOWA.

BANCROFT

VS.

MERCHANTS' DISPATCH TRANSPORTATION CO.

1. CARRIERS—CONNECTING LINE—LIABILITY—SPECIAL CONTRACT. A carrier which receives goods from a connecting line, is not entitled to the

benefit of any limitation upon its common law liability contained in an express contract entered into between the latter and the consignor, in its own behalf and for its own protection only.

2. *IBID.*—**DELIVERY—CONNECTING LINE—STORAGE.** The intermediate carrier is bound to deliver the goods to the carrier whose line of transportation is next in the route over which the goods are to be carried, and it is not relieved of responsibility by storing them in a warehouse at the terminus of its own route.

Appeal from Scott District Court.

The plaintiffs, merchants of San Francisco, purchased certain goods which were delivered by the consignors to the H. & N. H. R. R. Co., at Springfield, Mass. The cases containing the goods were marked to indicate that they were to be carried by the defendant, and were to be delivered to the Chic. & N. W. R. R. Co. and Pacific R. R. Co., for transportation over those roads on the route to San Francisco. The goods were delivered to defendant at New York city, and by it transported to Chicago, its terminus, and there stored in a warehouse. The goods were consumed in the great fire of October 8th, 1871. The H. & N. H. R. R. Co., after receiving the goods, gave to the consignors a receipt, stipulating that it assumed no liability beyond the end of its own line; and that it would not be responsible for "damages occasioned by delay from storms, accidents, or unavoidable causes; nor for the decay or injury of perishable articles; nor for injury to property produced by frost, heat or the elements." No express contract between the plaintiff and defendant for the carriage of the goods in question is shown. There was a judgment for plaintiff, and defendant appealed.

Stewart & White, for Appellant.

Martin, Murphy & Lynch, for Appellee.

BECK, J.

The only question in the case which need be determined by us is this: Did a contract exist between the defendant and plaintiff containing limitations, similar in their effect to the limitations of the contract as shown by the receipt executed by the Hartford & New Haven Railroad Co.? Counsel for

defendant maintain, that in the absence of evidence showing an express contract between the parties, the law raises the presumption that defendant undertook the carriage of the goods upon the same conditions under which they were transported by the railroad company of which they were received. The liability of defendant as a carrier upon receiving goods, in the absence of an express contract, was fixed by law. If that liability is limited in this case, it must be on the ground of some contract which the law will presume was made upon the goods coming into the hands of defendant. The law will not presume such a contract, unless a party be found who had the power to contract with defendant for the plaintiff, for it is a conceded fact, the plaintiffs or their consignors made no such contract. Now, it is claimed that such a contract was in fact made for plaintiffs by the Hartford & New Haven Railroad Co. Had this company authority to so contract for plaintiffs? Clearly not. It was not plaintiffs' agent for the purpose of transshipping the goods. The routes over which they were to be carried, were clearly indicated by the directions on the packages. It was the duty of the Hartford & New Haven Railroad Co. as a carrier, not as plaintiffs' agent, to deliver the goods to defendant. (*Babcock vs. R'y Co.*, 49 N. Y. 491; *Sherman vs. R'y Co.*, 64 *Ib.* 354.) The defendant upon receiving the goods from the connecting railroad, assumed the duty of a common carrier as fixed by law. It was required to deliver the property to the other carrier, whose line of transportation was next in the route over which the goods were to be carried. It was not relieved of responsibility by storing the property, and while holding the goods in the warehouse, its liability as a carrier continued. (*R. R. Co. vs. Man'g Co.*, 16 Wall. 318; *McDonald vs. R'y Corp.*, 34 N. Y. 437; *Rawson vs. Holland*, 59 *Ib.* 611; *Conky vs. R'y Co.*, 31 Wis. 619; *Hooper vs. R'y Co.*, 27 *Ib.* 81.) Such liability extended to and covered the loss of the goods by the fire. Affirmed.

Supreme Court of Pennsylvania.

MARCH, 1879.

WAGERING CONTRACT—STOCK GAMBLING.

FAREIRA vs. GABELL.

Notes given by a principal to a stock broker to cover losses incurred by the broker in stock-gambling on the principal's account are void.

Whether the transactions were *bona fide* or wagering is a question of fact for the jury.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by *John Fareira* against *George S. Gabell*, on five promissory notes drawn by the defendant to the order of the plaintiff.

The plaintiff having offered in evidence the notes, the defendant set up that, being desirous of operating in stocks, he employed the plaintiff, a broker, for that purpose. The contracts made through the agency of the plaintiff were simply contracts of wager. These transactions continued about two years. In July, 1875, he gave the plaintiff three of the notes in suit, amounting to \$7,000, as "margins on stock contracts," and two months later gave the other two notes for \$5,000 for indebtedness then appearing due.

The evidence for the plaintiff in rebuttal was, that in a settlement of accounts in November, 1875, there appeared a balance due the plaintiff from the defendant of \$14,794.67, which the defendant had admitted to be correct; that the defendant not having fulfilled his contract, the plaintiff had advanced the money necessary to cover the defendant's losses, with his assent, and also that in some cases, the stock was actually delivered to the purchasers, and sometimes it was not.

HARE, P. J., charged the jury as follows: "There is another aspect of the case to which I will now call your attention. Was this a gambling or wagering operation, which the law does not sanction, and will not carry into effect? Now, a wager may be defined as a contract in which the

parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss.

"This may be illustrated by an example: A and B agree, in consideration of a premium paid by B, that if a certain ship is lost at sea, A shall pay B the value of the ship. If B has no interest in the ship, it is a wagering contract, but if B has an interest, and will be loser if the ship is wrecked, it is a contract of indemnity, and not a wager. So if two men agree that if coffee rises in price, one of them shall pay a sum of money to the other, it is a wager, if they have no other interest in the coffee than that growing out of the contingency about which they stipulate. But it does not follow, that every contract which produces such a result is a wager; the question is one of intention, as deduced from the facts and circumstances.

"Let us suppose that A agrees with B to buy a thousand bushels of wheat, at \$2 per bushel, to be delivered and paid for at the end of thirty days. If wheat rises in value, A will be a gainer, and if it goes lower he will lose, but inasmuch as the apparent object of the contract is an actual purchase of the wheat, it is not a gaming contract. Nor could such a contract be justly regarded as a wager, although when the time for the delivery of the wheat arrived, it was agreed that B should, instead of forwarding the wheat to A, pay him the damages to which he would be legally entitled for a refusal to deliver; that is to say, the difference between the stipulated price and the actual value of the wheat at the time fixed for the fulfillment of the contract. Such a settlement of the difference would not, if there was nothing more, be a sufficient ground for inferring that the contract was a gambling contract, or contrary to law. But the case would be materially different if the evidence, taken as a whole, showed that A and B did not really intend to buy and sell; that there was no intention on the one hand to deliver, or on the other to receive, the wheat, and that their real purpose was to make a wager in the form of a contract of sale. Hence, if A and B were to deal with each other in the way supposed, during a series of months or years, and it appeared in

evidence that B did not, in any single instance, forward the wheat, or have it in readiness for delivery, and that when the time arrived for the fulfillment of these successive contracts, they were always settled by the payment of a sum of money answering to the rise and fall in price, the question would then be one of fact for the jury, whether the parties really intended to buy and sell, or to make a wager on the price of grain.

"A like question arises for the consideration of the jury in this case, that is to say, whether the intention was that the defendant should become an actual buyer and vender of stocks through the agency of the plaintiff, or whether the plaintiff expressly or impliedly agreed to act as the defendant's agent in gambling sales and purchases of stocks, which the defendant had not the means to deliver, and which it was no part of his intention to receive. If the jury find that the transaction was a gambling one on Gabell's part, and known to be such by Fareira, and that the services and advances which constitute the cause of action were made and rendered in carrying it into effect, their verdict should be for the defendant; and it does not necessarily vary the legal aspect of the case, that some, or the greater number of the persons with whom Fareira dealt, on Gabell's account, were actual buyers and sellers, and did not intend to gamble; although, if such be the fact, it may be taken into view by the jury in determining the true nature of the contract as between Gabell and Fareira.

"It is, however, contended by the plaintiff's counsel, that even if these were gambling operations on Gabell's part, and so understood by Fareira, he should still, in equity and good faith, be paid for the services which he rendered as Gabell's agent, and Gabell cannot rely on a fault which was common to both as a defense; and it is said in support of this proposition, that one who lends money, knowing that the borrower intends to gamble with it, may recover it back. This may, perhaps, be true as between such a borrower and lender, but I am clearly of opinion that one who should undertake to make a bet or wager for another, and advance the money staked, would have no right of action against his

principal in the event of loss; and I can see no difference between such a case and that of an agent who renders services and expends money in conducting any other gambling operation."

To this charge the plaintiff excepted, because although the jury should believe that he had no other interest in the contracts than that of his commissions as broker, yet the charge was equivalent to a binding instruction to find for the defendant.

Verdict and judgment for the defendant. The plaintiff took this writ of error, assigning for error the charge of the Court.

D. W. Sellers and *George W. Biddle* (*E. Cooper Sharpley* with them) for plaintiff in error, argued that as the plaintiff could make out his case irrespective of the alleged illegal transaction he could recover, and that the defendant would not be allowed to set up the invalidity of the consideration. To prevent a recovery, the very contract sued on must be void or against law. The plaintiff's case was perfect when he gave the notes in evidence. *Swan vs. Scott*, 11 S. & R., 155; *Telford vs. Adams*, 6 Watts, 433; *Lestapiés vs. Ingraham*, 5 Barr, 81; *Thomas vs. Brady*, 10 *id.*, 169; *Fox vs. Cash*, 1 Jones, 207; *Eyrick vs. Hetrick*, 1 Harris, 488; *Scott vs. Duffy*, 2 *id.*, 20; *Ex parte Pyke*, L. R., 8 Ch. Div., 754.; *Smith vs. Bouvier*, 20 Sm., 325, was a suit by brokers for money laid out in purchase and sale of stocks, and a recovery was had notwithstanding margins had been deposited.

T. J. Diehl, contra, contended that the propositions of the plaintiff in error were denied in *Ham vs. Smith*, (5 Week. N., 390.)

THE COURT.—The questions in this case were fairly submitted to the jury in a full and accurate charge by the learned President of the Court below. The principles enunciated by him we consider as entirely settled in (*Brua's Appeal*, 5 P. F., Smith, 294, and *Smith vs. Bouvier*, 20 *id.*, 325.) In no view of the charge as a whole was it equivalent to a binding instruction for the defendant.

Judgment affirmed.

Recent Decisions.

NATIONAL BANKS.

Power to Purchase Notes—Notice of Fraud.—In an action by a National Bank against the makers to recover notes purchased by the bank of a broker for value and before maturity, the evidence of the defendant tended to prove that the notes were executed in the defendant's—a partnership—name by one of the partners without the knowledge or consent of the other partners, for his own private purpose and in fraud of the rights of the firm; that said partner was also a member of the firm which he had made payees of the notes, and that as such he had indorsed the names of the payees on the notes and procured them to be discounted out of the usual course of business and in fraud of the defendants. The plaintiff's evidence tended to show that they had no notice of the fraud and had purchased the notes in the usual course of business. The Court charged the jury that a National Bank has the right to purchase notes in the manner in which these notes were purchased, and submitted to them the question of fraud and notice. The jury returned a verdict for the plaintiff, and defendant alleged exceptions. *Held*, no error. The Court said: "Under the instruction, the jury have passed upon the true issue, which is, whether there was fraud in the notes, of which the plaintiff had knowledge, or should be presumed to have knowledge. The notes were obtained by the plaintiff in the market, with no evidence that the party from whom they were obtained was not a *bona fide* holder of the notes for value. The fact that that party was a broker, if from that fact it is to be inferred that he was not the owner, raises no presumption that he was an agent of law for the negotiation of the notes. If any presumption could arise from that fact, it would be that he was the agent of the last indorser of the notes. The question as to the plaintiff's title to the notes is fully settled in the case of *National Pemberton Bank vs. Porter*, (125 Mass., 333.) If we assume, as contended by the defendant, that a National Bank cannot purchase a note, that contract of purchase is entirely independent of the executory contract which the plaintiff is seeking to enforce." (Massachusetts Sup. Ct., May, 1879. *Atlas Nat. Bank vs. Savery*.) Opinion by LORD, J.

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Current Topics.

IN speaking of the vacation season, the *Albany Law Journal* says: "But for the law editor there is no vacation. The 'dem'd horrid grind' never ceases. He is expected to be gifted with wit, wisdom, and the spirit of prophecy all the year round. He must make brick without straw. 'Current topics' must be invented, if not supplied to his hand. His patrons expect all the more of him, as the demand on themselves is relaxed. Exchanges are prosy; no new law books are to be praised or condemned; no rights arise to be championed; no wrongs to be denounced; no problems to be solved. He cannot close his shutters and pretend like some impecunious fashionables to be out of town. And so while the rest of the profession are luxuriating on the mountains or at the sea-shore, he is devouring his brains, with the thermometer at 90. He dreams that Judge Benedict has sentenced somebody to be burnt alive for stealing a rag-bag; that Judge Davis has condemned some lawyer to perpetual imprisonment for taking off his hat to him; that Mr. O'Connor has banished the Court of Appeals to a desert island for deciding a cause against him. In short, he needs rest, but how can he get it? The pulpit can be closed six weeks without apparent danger to anybody's immortal interests. But what would become of our profession if the *Law Journal* should suspend for six weeks, we cannot bear to contemplate."

Our season is over. The above is too full of severe and meditative truth for us to speak in the least jocosely concerning the subject. We know of no relief from the horrid contemplation of our sad fate, except a kind compassion by such of our patrons who may be a little in arrears.

AUTHORITY OF BUSINESS MANAGER TO BUY ON CREDIT.

The law of plaintiff and agent contains numerous questions of difficulty, and among them must be reckoned those with which the Common Pleas dealt in the recent case of *Daun vs. Simmins*, (40 L. T. Rep., N. S. 556.) The real point in that case related to the extent of the authority of the manager of a public house, but it involved some important principles of law. The action was brought by a spirit merchant against the owner of a public house, for spirits supplied to the defendant's manager. The manager was authorized to order spirits of two persons only, but not of the plaintiff. When the agents were sent in, the defendants repudiated the acts of his agent, and refused to pay. The argument on behalf of the plaintiff was, that the defendant put his agent in the business as general manager to carry on the business; and that, inasmuch, as the agent was left in possession of the premises, there was a holding out of him by the defendant as having authority to make binding contracts, which estopped the defendants from proving that he had no authority. The license was taken out in the name of the defendant, but was left in the possession of the manager. The invoices, too, were made out in the name of the defendant. The action was twice tried, and on both occasions the jury found for the plaintiff. A rule *nisi*, however, was granted for a new trial on the ground, that there was no evidence to go to the jury, and that the verdict was against the weight of evidence.

The grounds of the plaintiff's claim were two fold, but these might be easily resolved into one, namely: that the defendant had held out the agent as possessing the requisite authority, and was therefore liable with the respect to such holding out. There is a great variety of illustrations contained in the law books. The principle upon which they depend is that, if one person employs another in a character which involves a particular authority, he cannot by a secret reservation divest himself of that authority. Hence, we have another inquiry

raised in *Daun vs. Simmins*: did the character with which the agent was invested as manager, render the instructions of the defendant with respect to the persons with which he was to deal nugatory, so far as concerned a third person without notice?

In the early case of *Pickering vs. Busk*, (15 East. 38,) the plaintiff, the true owner, had bought goods through A, who was a broker and agent for sale. At the plaintiff's desire, transferred into the name of A, who afterward sold them. The action was brought to recover the goods. Lord ELLENBOROUGH ruled that the transfer by the plaintiff's direction, authorized A to deal with them as owners with respect to third persons; and that the plaintiff who had enabled A to assume the appearance of ownership to the world, must abide the consequences of his own act. The jury found for the defendants. Upon the argument of the rule to set aside that verdict, his lordship made use of his often quoted observations with respect to the limits of an agent's authority, remarking, that "strangers can look only to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorizes another to assume the apparent right of disposing of property in the ordinary course of trade, it must be assumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily, and in all cases limited to his actual authorities, the reality of which is afterward to be tried by the fact. It is clear, that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter." In a more recent case, *Summers vs. Solomon*, (26 L. J. 301, Q. B.) one of the defendant's shops was under the management of his nephew, who was in the habit of ordering goods of the plaintiff in the name of the defendant, who paid for them. In November, 1855, the plaintiffs received two orders for jewelry from the nephew. The goods were sent and acknowledged by the defendant as ordered by him. On the 7th March, 1856, the nephew ab-

sconded, and obtained on the 10th, 14th and 20th of the same month, a quantity of jewelry, the subject of the action from the plaintiff. The Court was of opinion that there was evidence for the jury that the nephew had authority to order the goods, the question being whether the defendant had so held the nephew out, as to lead the plaintiff reasonably to suppose that he was the defendant's general agent for the purpose of ordering goods.

Many of the reported cases relate to persons who hold themselves out as partners. The principle of those cases is of very general application. The principles of law that relate to the liability of a person who holds himself out as a partner were explained by Chief Justice TINDAL in *For vs. Clifton*, (6 Bing., 776.) The holding oneself out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used. In the ordinary cases of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner.

The decision of the Queen's Bench in *Edmunds vs. Bushell*, and another, (L. Rep. 1 Q. B., 97,) throws some light on the subject. In that case the defendant A carried on business in two different towns; in the one he traded as B & Co. There he employed the defendant B as his manager to carry on the business in his own name. The drawing and accepting bills of exchange was incidental to the carrying on a business of the like kind, and was proved to be so; but there was an agreement between B and A, that B should neither accept nor draw bills. Nevertheless B accepted a bill in the name of B & Co. This bill was taken by a banking company for a valuable consideration, and B was shortly after-

ward dismissed. It had also been agreed between A and B that B should receive as salary one half of the net profit derived from the business carried on in his name. The main question upon the argument was whether A was liable for the act of B. The Court acting upon the principle already adverted to, came to the conclusion that B must be taken to have had authority to do whatever was necessary or incidental to carrying on the business, and that he could not be divested of his apparent authority as against third parties by a secret reservation. A comparison of this case with that of *Dunn vs. Simmons* will show that they differ in some important particulars.

That the limits of an agent's authority will not be gathered from his private instructions, was the principle upon which the well-known case of *Whitehead vs. Tuckett*, (15 East., 400,) was decided. There the plaintiff purchased some hogsheads of sugar of the defendant's brokers. Then the defendant refused to give up, on the ground that the brokers had been entrusted with the sugar with a limited authority. The sugar in question had been purchased and paid from their own names by the brokers, and lodged in their now warehouse, but sold under the price directed by the defendant. A verdict for the plaintiff was found, on the ground that the extent of the authority was to be gathered from the recognized mode of dealing.

None of these decisions is a direct authority in support of the argument that a manager, under the circumstances of *Dunn vs. Simmons*, had authority to pledge his employer's credit. The question is, therefore, whether they support such a proposition. It certainly cannot be laid down as a universal proposition, that such a manager has implied authority to buy on credit. The Court thought there was no evidence of such authority to be inferred from the circumstances of the case, and by the application of Order XL., r. 10, gave judgment for the defendant. It is at least satisfactory to find that upon a motion for a new trial, where the Court has the necessary materials before it, final judgment may be given, thus saving the expense of a new trial.—*London Law Times*.

United States Circuit Court,

DISTRICT OF CALIFORNIA.

MAY, 1879.

THE UNITED STATES vs. W. S. CHAPMAN.

1. In the location of Sioux half-breed scrip, the rules and regulations of the United States Land Office require, that in all cases where not located by the scrippee in person, the application to locate must be accompanied with a power of attorney from said scrippee, authorizing the same.
2. While a contest between a purchaser from the State, on a State selection, and a claimant under Sioux half-breed scrip location, arising under the provisions of the Act of Congress of July 23d, 1866, is pending and undetermined before the Register and Receiver of the United States Land Office, no patent can properly issue.
3. The Act of Congress under which the Sioux half-breed scrip was issued, does not permit it to be located on land occupied by another; and the land in this case being occupied by the holder of a State title, with valuable improvements thereon, was not subject to location by said scrip.
4. At the time the State agent applied to select the land in question, January 15, 1868, there being no pre-emption, or other valid claim thereto, the State selection was good as one made on surveyed lands.

Walter VanDyke, counsel for Complainant.

George A. Nourse, for Plaintiff.

The following is the substance of Judge SAWYER's opinion:

This a proceeding on the part of the Government, at the instance of Mrs. Mary Polack, to set aside a patent for the quarter section of land described in the bill, on which the Geyser Springs and Hotel are located, in Sonoma County. The patent was issued to Daniel Freniere, and is based upon a location, or attempted location, of Sioux half-breed scrip. Mrs. Polack claims the same land under a State selection, as a portion of the 500,000-acre grant. In April, 1854, one Archibald C. Godwin employed the County Surveyor of Sonoma County to make a survey for him—it being then unsurveyed tide land—and he located, or assumed to locate, two school land warrants for 320 acres each, on a tract of land, including the premises in controversy, for said Godwin who was then the owner of said warrants. Said warrants were issued

by the State under the Act of May 3d, 1852, to provide for the issuing and sale of school land warrants for the 500,000 acres of land granted to the State by Act of Congress of September 4th, 1841. By proper mesne conveyances and assignments, the right and title of said Godwin to said premises, and the warrants located thereon, became vested in Mrs. Mary Polack (then Mrs. Hart,) in May, 1862. Her immediate grantor and assignor before that time had instituted an action in the District Court for Sonoma County to oust some parties who had intruded into said premises, to wit, Godwin, Levy and Ewing, in which action a judgment was rendered in favor of the plaintiff against said defendants. A writ of possession was issued on this judgment, and in May, 1863, the Sheriff of Sonoma County put Mrs. Polack, as successor in interest of the plaintiff in that action, into possession and turned out the intruders. From that time till December 31st, 1869, it is admitted, Mrs. Polack by herself and tenants had the exclusive possession and control of said premises and was in the actual occupation thereof; that during this period she had expended, in adding improvements to the place, between three and four thousand dollars, and that the value of the improvements purchased and added was over twelve thousand dollars.

In September, 1862, Mrs. Polack took steps to have a re-survey of the premises she had purchased, and relocation of said warrants thereon, so as to adjust the lines according to the system of surveys adopted by the United States, in accordance with the act of the State, passed April 18th, 1859. This act requires that the applicant for a survey and location should make an affidavit containing, among other things, a statement that there was no adverse claim to the land sought to be located.

In the affidavit filed by Mrs. Polack, it was stated that there was no *valid* adverse claim; and it is contended this was not a compliance with the statute. The affidavit, however, refers to the matter of the action by her grantor against the parties who had intruded into the premises, in which it had been decided in favor of her title, and says this is the only claim adverse to hers. This, it would seem, is a substantial

compliance with the law, for this claim had already been finally adjudged invalid, and it was so stated; and this being the only adverse claim, it necessarily results, that there was none within the meaning of the act, and it so appears in the affidavit. In the view taken of the case, however, it is not necessary to pass upon this question.

The map of the United States survey of Township 11 N, embracing the land in question, was filed in the United States Land office January 14th, 1868. On the next day, January 15th, 1868, the State Locating Agent filed an application on behalf of the State of California for Mrs. Polack, and on her application to him for that purpose, for the location of said school land warrants, and he located them on surveyed lands nearest conforming to the lands on which they had been located, to wit: the N. $\frac{1}{2}$ of Sec. 13, and N. $\frac{1}{2}$ of Sec. 14 of said Township. This application was received and approved by the Register of the United States Land office, and thereafter, April 14th, 1868, the said Register of the United States Land office issued a certificate, certifying that at the date of said filing and selection on the part of the State, there was no evidence shown by the records or files in his office that any pre-emption, homestead or other right had attached to said land.

The record of the Sioux scrip in the United States Land office for 1868 shows entries up to July, and no entry for the application for Daniel Freinere for the N. E. $\frac{1}{4}$ of Sec. 13—land in controversy—and also shows an erasure of the entries down to July 18th, 1868, and then the insertion of the application of Daniel Freinere as of January 14th, 1868, and the erased names and applications carried below. In explanation of this, it is said the scrip in the name of Freinere for 444 E., the one in question, was mislaid in the office, and not entered on the books till the time it was found in July. It appears that Chapman, the defendant, had attempted to locate the same scrip on this land in 1866, before the United States survey of the land. Inasmuch, as the Indian or half-breed never lived on the land or resided in the State, the land being unsurveyed, no such location could then legally be made.

There is endorsed on the application to locate this Sioux scrip the words: "Power to locate with R. R. No. 7, S. F. Land Office," meaning that the power of attorney of the scrippee, Freinere, authorizing Chapman to make the location, was with another piece of scrip issued to the same party, to wit: The piece of scrip No. 444, letter B, which had been previously located in the same land office on another tract of land, and had been endorsed in said office R. & R., No. 7. This latter piece of scrip with the application to locate the same, it appears, was returned to Chapman through Britton & Grey, his attorneys at Washington, in 1868, on account of some defect in the location, and subsequently located in the United States Land office at Stockton on another tract of land. The power of attorney found with this scrip, as so located at Stockton, was only a special power to locate that particular scrip. There was no power shown to locate the scrip 444 E, the one attempted to be located on the land in question. The rules and regulations of the Land Office, require that in all cases where not located by the reservee in person, the application to locate must be accompanied with the power of attorney authorizing the same.

The officers of the local Land Office having recognized said scrip as being presented for location January 14th, 1868, although, not then entered on their books, a contest arose as between it and the State selection.

The Act of Congress of July 23d, 1866, to quiet land titles in California, provides that in cases where the State had theretofore made selections of any portions of the public domain in part satisfaction of any grant made to said State by Act of Congress, and had disposed of the same in good faith under her laws, the lands so selected were confirmed to the State; and where such selections were on unsurveyed lands when marked off and designated, they were to have the force and effect of a pre-emption right, and if the lines of the location and United States survey did not agree, the selection should be so changed as to include those legal subdivisions which nearest conform to the identical land included in State survey and selection. The holder of the State title is allowed the same time after the township plat is filed in the local land

office as a pre-emptor to present and prove up his purchase and claim.

The State locating agent, in his application of January 15th, 1868, on behalf of Mrs. Polack, based the claim of the State on this act of Congress, as well as under the act of 1841, providing for the selection on surveyed land. On the motion of Chapman, the Register of the United States Land office cited the State to appear at a hearing before that office, to determine the respective rights between the State selection and the scrip location.

The attorney of Mrs. Polack holding the State title, and Chapman's attorney for the scrip location, appeared and entered on the trial July 9th, 1868. The case being adjourned to the next day, the United States Surveyor-General notified the Register that the township plat embracing this land was suspended, and thereupon the hearing was also suspended, and continued so until August, 1874, after the suspension of the township plat had been removed. In the meantime, while the contest was pending and undetermined, and while the survey was thus suspended by some inadvertence, a patent was issued to Daniel Freniere June 1st, 1869, for the scrip location, and came into the possession of Chapman through his attorneys at Washington. As soon as the attention of the Department was called to the fact, that the contest between the State selection and scrip location was still pending, the Commissioner of the General Land office, May 17, 1870, demanded a return of the patent.

The purchaser of the State title under the act of 1866, has a right to have his claim to the land, selected under the State laws, fully passed upon by the United States Land office: "The Register is to examine his claim, the character, the right asserted, and the certificates under which he claims." (*Huff vs. Doyle*, 3 Otto, 563.) No patent could properly issue to an opposing claimant for the same land while this hearing was pending and remained undetermined.

In addition to this, as already stated, at the time it was attempted to locate the Sioux scrip, the land was occupied by Mrs. Polack and her tenants, and there were valuable improvements thereon belonging to her. The act of Congress

under which the scrip is issued does not permit it to be located on occupied lands, except in the district in the then territory of Minnesota mentioned in the act, and on behalf of the party in occupation. Hence, this land at the time was not subject to location by such scrip; and there being no pre-emption or other valid claim, the State selection of January 15th, 1868, was good as a selection on surveyed lands.

I am of the opinion, therefore, that the patent was improperly issued, and that it should be set aside, and it is so ordered.

United States District Court.
DISTRICT OF OREGON.

TUESDAY, MARCH 11, 1879.

CARGO OF THE "BENLEDI"—SUIT IN ADMIRALTY.

BALFOUR, GUTHRIE *et al.*, vs. WILKINS *et al.*

- (1.) **USAGE—RAINY DAY.** The phrase "rainy day" being of itself indefinite and uncertain, the sense in which it was used in a particular contract may therefore be shown by the surrounding circumstances including the usage of the particular port or trade to which the contract relates.
- (2.) **CHARTER PARTY—RAINY DAY CLAUSE IN—CONSTRUCTION OF.** A charter party provided that the charterers should have 30 working days, not counting "rainy days" in which to load a vessel with grain at Portland, Or. *Held*, that the phrase "rainy days" was intended to apply only to the days on which the rainfall was such as to prevent the loading of the vessel with safety and convenience—the actual facilities of the port for so doing, being considered.
- (3.) **SAME SUBJECT.** A contract entered into in Liverpool to load a vessel with grain in Portland, Or., is in contemplation of law made at the latter place, and therefore the condition and conveniences of such port for loading vessels with grain, or the established usage thereof upon that subject, may be shown to explain the meaning and use of dubious and uncertain phrases in the same—as for instance—"rainy days."
- (4.) **DEMURRAGE—BILLS OF LADING.** The person to whom a bill of lading of a cargo is made, or the endorsee thereof, has the legal property in the same, free from the lien for demurrage, and therefore the owners of a vessel with an overdue claim for demurrage against the charterers, for which by the terms of the charter party they have a lien upon the cargo, are not bound to sign unqualified bills of lading to the charterers for such cargo, until such claim for demurrage is satisfied; and if

such vessel is detained in port for want of a clearance, which by the terms of the charter party the charterers were to obtain, but did not for want of the bills of lading, such detention is, nevertheless, the fault of the charterers in not paying the demurrage or accepting bills of lading subject to the same, and, therefore, they are liable to the owners for the damage arising from such detention.

DEADY, J.

This is a suit *in rem* and *personam*, brought by certain parties constituting the firm of Balfour, Guthrie & Co., doing business in this city as the agents of Watson Brothers, of Glasgow, against certain persons constituting the firm of Wilkins & Co., of San Francisco, and J. M. Ten Bosch, of this city, and the cargo loaded here on the British ship *Benledi* for \$852.60 for demurrage and \$341.04 for damages for detention of said vessel after she was loaded.

The admitted facts in the case are as follows: On April 27, 1878, the ship *Benledi*, owned by Watson Brothers aforesaid, was duly chartered to the defendants, Wilkins & Co., for a voyage from the port of Portland, Or., to a port in the United Kingdom, or on the continent between Havre and Hamburg—the charterers to load said vessel at Portland with a full cargo of wheat or flour, or other lawful merchandise, to be carried for a specified freight.' Among other things the charter party provided that "the lay days for loading" at Portland should commence 24 hours after the discharge of inward cargo, and the report of the master that he was ready to receive cargo, and continue for "30 working days to load," excepting "rainy days" which were "not to be counted as lay days for loading;" that "for each and every day's detention over the specified number of lay days, 4 pence per register ton per day, day by day, shall be paid by the charterers to the owners or their agents as demurrage;" that the cargo should be stowed under the direction of the master, but the vessel should employ the stevedores named by the charterers at the customary rates; and that the owners should have a lien upon the cargo for all freight and demurrage due under the charter party.

The *Benledi* arrived at Portland in ballast, on September 17, 1878, and on the 25th of the same month the master re-

ported that he was ready to receive cargo, and the defendant, Ten Bosch, acting as the agent of said Wilkins & Co., received said vessel and commenced loading her on October 30th and completed the same on November 11th following. The libellants, as the agent of the owners, claimed that the charterers had detained the vessel ten days beyond the time specified in the charter party, and regularly demanded the agreed rate of demurrage therefor, which claim, the charterers, by their agent, Ten Bosch, denied and refused payment of the same, whereupon the libellants refused to sign the bills of lading for the cargo, unless the demand was paid or stated to be due thereon.

The charter party provided that the vessel should be cleared in the name of the charterers, but on account of this dispute about the bills of lading the charterers were unable to file a manifest of the cargo in the Custom House, and thereby the vessel was detained in port four days after she was otherwise ready to go to sea.

The difference between the parties about the demurrage and the bills of lading grew out of the question, whether of the 48 days that elapsed between the time the master gave notice that he was ready to receive cargo and the completion of the loading, there were ten "rainy days" within the meaning of that phrase as used in the charter party; and upon the correct construction of the clause in which this phrase occurs depends the proper determination of this controversy.

The defendants stand, as they claim, upon the *letter* of the contract, and insist that a day upon which *any* rain falls is a "rainy day" within the terms of the contract, and therefore not to be counted as a working lay day. On the other hand, the libellants contend that mere rain-fall does not make a "rainy day" within the meaning and spirit of the agreement, but the rain-fall must be such—the subject matter, the usage, circumstances and facilities of the port being considered—as prevents the safe and convenient loading of such cargo.

The evidence shows that there was rain-fall on two days in September, 13 days in October and two days in November—

in all 17 days; and that the fall ranged from 1.100 of an inch to 87.100 per day, and averaged about 26.100, or a quarter of an inch. It also appears, that during all the time between September 25 and November 11, that wheat was loaded by the leading shippers in this port, and it does not appear that any one who had the wheat on hand ever declined to load it on account of the weather, but the reasonable inference is to the contrary.

On the trial, the libellants offered and were permitted to introduce, subject to further argument and objection, evidence from which it appears that it is the known and established usage of this port to load wheat on rainy days, unless the rain-fall is very heavy and accompanied by a driving wind, which very seldom occurs; and that the wharves are so constructed and the facilities for loading are such, that wheat can be as safely and conveniently put on board a vessel here in ordinary wet weather as dry. Indeed, Mr. C. H. Lewis, a leading and long established shipper and loader, testified that in his experience, he did not remember being prevented from loading by rain, but on one occasion.

Different from this, but not contrary to it, or affecting the fact of the usage, the evidence introduced by the defendants showed that during the past four years there were a few instances in which parties who did not have the wheat to put on board, claimed under charter parties similar to this, that days on which rain fell were not to be counted as working days, and such claim was either submitted to or compromised. But it is not pretended that in any instance a shipper declined to deliver wheat or a master to receive it really on account of the rain-fall.

This contract, though made in Liverpool, was to be performed, so far as this controversy is concerned, in Portland; and, therefore, the presumption is, that the parties to it contracted with reference to the laws, usages and general circumstances and condition of this port, including its climate and modes and facilities of discharging and receiving cargo. In other words, the contract, so far as it was to be performed here, is considered to have been made here. (*Andrus vs.*

Pond, 13 Pet., 77; *Naylor vs. Ballzell*, Tan., Dec., 62; Story's Con. Laws, § 280.)

Assuming, then, as we must, that this contract, as to loading the *Benledi*, was made here, is it competent to prove a usage in this port to load on days of ordinary rain-fall, to ascertain the intention of the parties to the agreement so far as this "rainy day" clause is concerned.

The decisions of the Courts upon this subject have not been uniform, but the leaning of the latter cases is to limit the office of usage, and with this tendency I agree.

But cases do and must arise, where the intention of parties to a contract could not be understood unless proof was allowed of the usage on the subject with reference to which it was made. And this is especially so in the case of mercantile contracts, and particularly the one styled a charter party. The rule is laid down in Abb. on Ship, (p. 250—274,) that the construction of a Charter party "should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates;" and this is cited with approbation by the Supreme Court in *Raymond vs. Tyson*, (17 How., 59,) in which Mr. Justice WAYNE says, "that a charter party is an informal instrument as often as otherwise, having inaccurate clauses, and that on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of the trade.

In the Schooner *Reesei de*, (2 Sum., 567,) Mr. Justice STORY says: "The true and appropriate office of a usage or custom is, to interpret the otherwise undeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful and equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter, to which they are

applied." See also *U. S. vs. Robinson*, (1 Saw., 219; S. C., 13 Wall., 363.)

Finally, in the well considered case of *Barnard vs. Kellog*, (10 Wall., 390,) the Supreme Court lays down the rule:

"The proper office of a custom or usage in trade, is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation, on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to *explain words or phrases in a contract of doubtful signification, or which may be understood in different senses according to the subject-matter to which they are applied.* But if it be inconsistent with the contract, or expressly, or by necessary implication contradicts it, it cannot be received in evidence to affect it."

The phrase rainy day has no definite and certain meaning. It may be used and understood in many senses. In common parlance, it varies in signification from the day with light, passing April showers to the steady and strong pour down of an Oregon December. Worcester defines *Rainy* as follows: "Abounding in rain; showery; wet;" and Webster's definition is the same. But the definition, while it fixes some limit to the signification of the term—as that a rainy day is a *wet* one, and therefore not a *dry* one—does not free the matter from the uncertainty which is inherent in the expression.

Taken literally, in my judgment; the phrase "rainy day" means nothing less than a *day of rain*—a day on which rain falls during every moment of the period. Otherwise, the day is not *wholly* a rainy day but only *partly* so. Strictly speaking, as well say that a few minutes of sunshine make a *fair* day as that a shower makes a *rainy* one.

Colloquially, it may be often used to describe a day upon which at least a moderate rain-fall occurs during the greater portion of the time.

During a period of six years from 1873 to 1878, inclusive,

as appears from the record of observations in the office of the signal service in this city, the days upon which *any* rain fell numbered from 151 to 172 a year—the average being 162 days: and the total rain-fall during the same period ranged from 46.17 to 60.08 inches a year—the average being 52.96 inches; while the average fall per day for each of such years varied from 0.28 to 0.34 inches—the average fall per day for the whole period being 0.33 inches, or one-third of an inch. The greatest rain-fall on any one day in such years varied from 1.66 to 3.05 inches, and the average of such days was 2.33 inches.

Judged by these figures, the rain-fall upon the days in question was relatively very light—it being only $\frac{1}{3}$ of an inch per day as against $\frac{1}{2}$ of an inch for the past six years, which latter computation includes many days—15 in 1878—upon which the rain-fall was inappreciable, or too small to be measured.

Yet, the fact is, the phrase when used abstractly, and without reference to the surrounding circumstances, is altogether indefinite and uncertain. To say, simply, that a day is a rainy one, is almost as vague an expression as that a thing is as big as a piece of chalk, or as long as a string.

A contract to plough, ditch or cut wood, "rainy days" excepted, would not be understood or construed as would a contract to harvest grain, rainy days excepted. Reference being had to the subject matter, it would be manifest that the parties had not the same degree of rain-fall in view in making the last contract as the others, because they could be conveniently performed in weather in which the moisture would make it unsafe and unfit to harvest. In short, the phrase is one which may be used in different senses, according to the nature of the subject-matter concerning which it is applied, and therefore may, according to the uniform doctrine of the authorities, be explained by usage where one exists. (1 Green, Ev., § 292.) The established usage in this port being to load wheat on all such days as rain fell upon, between September 25 and November 11, 1878, and it being presumed that the parties used this phrase in the con-

tract with a knowledge of this usage, it follows that within the meaning of such contract, and the intention of the parties thereto, there were no rainy days within the time allowed for loading the *Benledi*—nor in fact, during any of the time she was in port.

But I think, the same conclusion may be reached, without invoking this usage, as such. The charter is a written contract which the Court must construe. If it contains any vague or dubious terms or provisions, the Court in ascertaining what the parties understood and intended thereby, may consider the contract in the light of the surrounding circumstances. (1 Green, Ev., § 277.) As declared in § 686 of the Or. Civ. Code: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge may be placed in the position of those whose language he is to interpret."

This contract was made in Liverpool to be performed in Oregon. By it, the charterers agreed to load the *Benledi* with wheat at Portland—the vessel to lay here for that purpose at the expense of the owners, for 30 *working* days—that is, 30 days including holidays—and longer if need be, at the expense of the charterers. But, if after the working days commenced "rainy days" should occur, they were not to be counted. Now, what was the object of this exception? Certainly, not to enable the charterers to compel this vessel to lie here every day that any rain fell between September and May—six months it may be—at the expense of the owners, while they were waiting for a fall in the price of wheat to purchase a cargo cheaply. The only object in giving 30 working lay days to the charterers, was to enable them to purchase a cargo and get it on board, and a rainy day which would materially interfere with this purpose was to be excepted therefrom. Of course the rain-fall could not interfere with the *purchase* of cargo, and therefore it can only be considered as affecting the loading of the same, supposing the charterer had the wheat on hand.

The burden of proof is upon the charterer to show that there were such days. The parties are presumed to have had in mind the known condition of things at this port when the contract was made, and contracted with reference to it—for instance, that there were covered wharves here from which cargo could be, and commonly was safely, and conveniently loaded in all ordinary rainy weather. The phrase “rainy day,” then, as used in this contract, and as both parties to it must have understood it, means a day on which cargo could not be safely and conveniently loaded at this port.

Contracts must have a reasonable construction; and when they contain ambiguous or doubtful expressions, these should be taken in that sense which best agrees with the general purpose of the contract. (Chit. on Con. 74.)

The much greater portion of the yearly, mean number of days—162 or over 5 months—on which *some* rain fell in the last six years, occurred in the usual season for shipping wheat from Portland for foreign ports.

Under the construction claimed for this contract by the defendants, it would be in the power of the charterers in such a charter party to detain a vessel here at the expense of the owners, from three to four months beyond the usual lay days, or the time deemed necessary for purchasing a cargo and putting it on board, simply because they had no cargo to deliver, and desired to wait for a more favorable market to purchase in. Now, nothing is plainer than that the owners did not contemplate any such risk, or any such delay as this, and nothing can be more unreasonable than to suppose that the parties to this contract ever intended to make any such one-sided and unjust agreement.

It may not be amiss to notice the fact, as strengthening this conclusion, if there can be any doubt about it, that this charter party is a long printed formula, composed of disjointed and independent clauses intended for use in any part of the world, and particularly San Francisco, where, until lately at least, on account of the rarity of rain, there were no suitable conveniences for loading grain in wet weather. But the same forms appear to be used for any place by strik-

ing out and inserting clauses to adapt them to the particular port for which they are then intended, and are usually very inaccurate and incomplete, and ought to be construed liberally in support of what appears to have been the real intention of the parties. (*Raymond vs. Tyson*, supra 59.) Printed formulas are always general in their nature, so as to be used by different contracting parties, for similar subjects, but they do not contain the actual and immediate language of the parties thereto as in the case of an agreement reduced to writing *pro re nata*, and therefore are not supposed to express the understanding and intention of the parties with the precision and completeness of a written agreement. (1 Green. Ev. § 278.) The claim for demurrage must be allowed.

The demand for damages for four days' detention after the cargo was on board, rests upon the right of the libellants to retain the bills of lading until the demand for demurrage was satisfied, or to sign then subject to it; and of this I think, there can be no doubt. The legal property in the cargo is in the person to whom the bills of lading are made or endorsed. (The *Thames*, 14 Wall. 108; the *Vaughn* and *Telegraph*, Id., 266.) Had the libellants given Wilkins & Co. clean bills of lading, the latter might have transferred them to third persons, at once, as they intended to do, and thereby they would have lost their lien on the cargo for the demurrage. This they were not required to do. The claim for damage is also allowed. The defendants made a counter-claim for \$2,609.31 damages, on the ground of being kept out of the use of the money for which they might have disposed of the cargo of the *Benledi*, but for the withholding of the bills of lading. But as the libellants were justified in detaining the bills, they are not liable therefor.

There must be a decree for the demurrage—\$852.60, with interest from November 11th—4 months—\$28.41, and for the damages for detention at Astoria, \$341.04, with interest from November the 25th—3½ months—\$10.06—in all, \$1,232.21 with costs and disbursements.

Ellis G. Hughes, for Libellants.

William H. Effinger, for the Defendants.

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Current Topics.

WE are glad to announce to our patrons, and the bar of Oregon, that all necessary arrangements are now completed for the publication of the opinions of the Supreme Court of that State, furnished us by the reporter, as prepared, for their official publication about one year hence.

A WEEKLY contemporary of this city says: "That there is danger that the next Judiciary of this city will be the weakest ever chosen to administer the litigation of the most litigious people on the face of the globe. One cause for this, perhaps, is that the salary has been reduced to a point at which it ceases to attract men of the requisite talent. It is a huge mistake to underpay judges. It is false economy. Bad decisions will inevitably cost more money than would suffice to procure the services of the very ablest men as judges. But low as the salary is, better men are obtainable than many that seem likely to be elected. The truth is, too little attention is being given to the election of the Judiciary. There are so many offices going, and so many people scrambling for them, that attention is not sufficiently focussed upon the delicate and difficult task of selecting honest and capable judges. Party spirit is rife, and purely partisan tickets are likely to be successful even in the case of the Judiciary. This is a misfortune that can be, and ought to be, avoided. Judicial talent is the monopoly of no one political party. We sincerely trust, that no independent voter will vote a straight party ticket for the Judiciary. The nicest discrimination should be used in choosing the very best men from all the tickets, and a sturdy resolution should be formed to vote for such men, quite regardless of party nominations. If that process of seeking the survival of the fittest is diligently pursued, we may get a fair Judiciary. It is the only sure way that remains to us, now that purely partisan nominations all round are decided upon." We do not share the fears of our contemporary. Already, many good and capable men are aspiring to those Judicial positions.

United States Circuit Court.

DISTRICT OF OREGON.

MONDAY, JULY 28, 1879.

(No. 519.)

ACTION TO RECOVER DAMAGES FOR THE INFRINGEMENT OF A
PATENT.

THOMAS SAYLES

VS.

THE OREGON CENTRAL RAILROAD CO.

- (1) **LIMITATIONS.** Under § 721 of the R. S., the State Statute of Limitations applies to actions in the national Courts, except where the laws of the United States otherwise provide.
- (2) **SAME—PATENT CASES.** The limitation contained in § 55 of the patent act of July 8, 1870, (16 Stat., 206,) was repealed by operation of § 5596 of the R. S., but as to all actions and suits upon causes arising before said repeal—June 22, 1874—said limitation was continued in force by § 5599 of the R. S., and, therefore, an action to recover damages for the infringement of a patent before June 22, 1874, is not within the operation of the State Statute of Limitations.
- (3) **AMENDMENT OF STATUTE.** *Semble* that under § 22, of Art. IV, of the Constitution of the State of Oregon, a section of a statute cannot be amended by simply repealing a clause or subdivision of it, and that, therefore, subdivision 5, of § 6 of the Or. Civ. Code, in which six years are given to bring this action, is still in force, notwithstanding the attempt to repeal the same by the act of October 22, 1870. (See Laws, 34.)

DEADY, J.

This action was brought to recover damages for the unlicensed use of a patented railway car-brake.

The complaint states, that the invention was patented to one Henry Tanner, for the period of 14 years, on July 6, 1852, and afterward, on July 6, 1866, the patent was extended for 7 years; that on July 13, 1854, Tanner assigned the patent and extension for certain parts of the United States, including Oregon, to the plaintiff; and that the defendant, between July 6, 1871, and July 6, 1873, did make and use said brake in violation of said patent, and the assignment aforesaid, to the damage of the plaintiff, \$475.

The defendant demurs to the complaint, and substantially alleges, that the cause of action is barred by lapse of time. § 55 of the patent act of July 8, 1870, (16 Stat., 206,) provides that the Circuit Courts of the United States shall have cognizance of all actions arising under the patent laws, and that all such actions "shall be brought during the term for which the letters patent shall be granted or extended, or within six years after the expiration thereof."

In the revised statutes, said § 55 is re-enacted as § 4921, less the limitation clause above quoted, which was repealed by operation of § 5596 of the R. S. Section 721 of the R. S., re-enacts § 34, of the act of September 24, 1879, making the laws of the several States "rules of decision in trials at common law," except where the laws of the United States otherwise provide. Under this section it has been uniformly held, that where Congress had not otherwise specially provided, the State Statute of Limitations applies to actions in the national Courts.

It follows from this statement of the case, that unless there is a saving clause in the repealing provisions of the R. S., the only Statute of Limitation now, or since June 22, 1874, applicable to this class of actions is that of the State. Upon the assumption that there is no such saving clause, the defendant contends that this action is barred by subdivision 1 of § 8 of the Or. Civ. Code, which limits the time for commencement of the actions therein enumerated to two years from the time the cause of action accrued.

But there is a serious question, whether the State statute does not give six years in which to bring this action. Originally, the clause in subdivision 1, of § 8, concerning actions for any other "injuries to the person or rights of another," under which it is sought to bar this action, was contained in subdivision 5, of § 6, that gives six years in which to sue upon causes of action therein enumerated. By the act of October 22, 1870, (Ses. Laws, 34,) it was attempted to amend both §§ 6 and 8 of the Code by simply repealing *subdivision 5* of the former, and repealing and re-enacting the latter, so as to include in subdivision 1 thereof the cases

before then provided for in said subdivision 5, and thereby reduce the time within which actions might be brought thereon from 6 years to 2.

It can hardly be doubted that this attempt to amend said § 6 by simply repealing a certain portion of it, is in direct violation of § 22 of Art. IV of the Constitution of the State, which provides, that:

"No act shall ever be revised or amended by mere reference to its title, but the *act* revised or *section* amended shall be set forth and published at full length."

Now, although § 8 may have been properly amended, yet if § 6 was not, then subdivision 5 thereof is still in force; wherefore, the result is, that there are two periods of limitation in the statute for actions of this kind—one for six years and the other for two. In such a case the plaintiff may avail himself of the longer period, and the shorter is practically a nullity.

But, I think, there is no reasonable doubt but that § 5599 of the R. S. contains a saving clause by which the limitation in § 55 of the act of 1870, *supra*, is continued in force for the purposes of this action. It reads:

"All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures embraced in said revision and covered by said repeal, shall not be affected thereby, but all suits, proceedings or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made."

It is difficult to conceive of anything plainer or more comprehensive than this. Read simply with reference to this case, it provides that any act of limitation applicable to actions for the infringement of patents embraced in the revised statutes or covered by the repealing clauses thereof, shall not be affected thereby, but all such causes of action arising prior to said repeal may be commenced and prosecuted as if said repeal had not been made, which would be at any time within six years from the expiration of the patent or the extinction thereof.

Counsel for the demurrer cites *Sayles vs. The R. P. & P. Railway Co.*, (11 Legal News, 281,) in which it seems to have been assumed that the limitation clause in § 55 of the act of 1870, *supra*, was unqualifiedly repealed by the revised statutes, and that, therefore, the limitation in actions and suits for the infringements of a patent, since June 22, 1874, under § 721 of the R. S., is to be found in the law of the State where the same is brought. But as in that case the suit was not barred by either the national or State statute, it was not material to inquire further; and, in fact, the attention of the Court does not appear to have been called to § 5599, *supra*, which, as has been shown, expressly provides that actions and suits upon causes arising before the revision and repeal of June 22, 1874, "may be commenced and prosecuted within the same time, as if said repeal had not been made."

The demurrer is overruled.

Addison C. Gibbs, for the Plaintiff.

Joseph N. Dolph, for the Defendant.

MONDAY, JULY 21, 1879.

SUIT IN EQUITY FOR INJUNCTION.

PERRY BAKER *et al.* vs. THE CITY OF PORTLAND.

- (1) **RESIDENCE.** The right to reside in a foreign country implies the right to labor there for a living.
- (2) **TREATY.** A state has no power to interfere with, or in any way limit the operation of a treaty of the United States.
- (3) **MULTIFARIOUSNESS.** Parties having distinct claims against the same defendant cannot maintain a suit in equity thereon, jointly; and a bill containing two or more such claims is multifarious.
- (4) **CONTRACTORS.** Any number of persons who may from time to time be engaged in making street improvements under several and distinct contracts with the city, are not, therefore, a class of persons having a common interest in the subject of street improvements, concerning which, any one or more may sue for the whole.

DEADY, J.

This suit is brought to enjoin the city of Portland from enforcing an act of the Legislature, approved October 16,

1872, (Ses. Laws, p. 9,) entitled, "An act to prohibit the employment of Chinese laborers on the improvement of streets and public works in this State."

The bill alleges that the complainants "are residents, citizens, property-holders and taxpayers" of Portland, and now are, and have been, for many years engaged in the business of contracting for and making street improvements therein; that the defendant, by its Mayor and Common Council, now require the complainants and other contractors to give bonds not to employ any Chinese labor upon such improvements, and threatens to refuse payment to any contractor, and declare him delinquent who shall do so; that the said act of the Legislature and the acts of the defendant thereunder are contrary to the Constitution and laws of the United States and its treaty with the Ta-Tsing empire, and contrary to the rights of "the complainants and other property-holders, residents, citizens and taxpayers" of Portland, and "the contractors and bidders upon the street improvements and other public works of the defendant;" that the work upon the streets of the defendant is required by law to be let to the lowest responsible bidder, and that the defendant has contracted for, and is about to contract for, upward of \$50,000 worth of work upon its streets, to be done this season, and has acquired, and declares that it will, in all cases, require contractors and bidders to give bond not to employ Chinese labor upon such work; that "said acts of the defendant done and threatened are, and will be, an irreparable injury to the complainants and other contractors and bidders" upon the street improvements of Portland, and "to other residents, citizens, property-holders and taxpayers" of the same, of many thousands of dollars; that "the injury to the complainants in the completion of their several contracts with defendant, already entered into for street improvements," by reason of being compelled to give bond as aforesaid, and "the threats and declarations of defendant to prohibit the employment of Chinese laborers upon its street improvements" by the means aforesaid "will amount to upward of \$1,000."

Upon reading and filing the bill—July 7—an order was made that the defendant show cause why a provisional injunction should not issue as prayed for. The defendant showed cause by demurring to the bill, which, on July 14, was argued by counsel.

The demurrer sets up: (1.) That this Court has no jurisdiction to grant the relief prayed for; (2.) That the bill is without equity; (3.) That the complainants have no privity of interest, and are, therefore, improperly joined as parties, and, (4.) That complainants have "a full and complete remedy at law."

As to the want of jurisdiction, it is claimed that it does not appear that the matter in dispute exceeds the sum of \$500; but on the hearing, it was tacitly admitted that otherwise this was a case of Federal cognizance, because arising under a treaty made by authority of the United States,—namely, the treaty of June 18, 1858, and the additional articles thereto of July 28, 1868, between the United States and the Emperor of China.

Article V of said additional articles, declares that the two high contracting parties "cordially recognize the inherent and inalienable right of a man to change his *home* and *allegiance*, and also, the mutual advantage of the free migration and emigration of their citizens and subjects respectively, from *the one country to the other*, for the purpose of curiosity, of trade, or as *permanent residents*;" while article VI. of the same, declares that "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may then be enjoyed by the citizens or subjects of the most favored nation;" and that citizens of the United States visiting or residing in China, shall enjoy there the same privileges, etc. Public Treaties, U. S., 148.

This treaty, until it is abrogated or modified by the political department of the government, is the supreme law of the land, and the Courts are bound to enforce it fully and fairly. An honorable man keeps his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage.

The State cannot legislate so as to interfere with the operation of this treaty, or limit or deny the privileges or immunities guaranteed by it to the Chinese residents in this country. As was said by Mr. Justice FIELD, in the "Queue Ordinance Case," lately decided in the Circuit Court, for the district of California—to the National Government, "belong exclusively the treaty-making power, and the power to regulate commerce with foreign nations, which, includes intercourse, as well as traffic. * * * That government, alone, can determine what aliens shall be permitted to land within the United States, and upon what conditions they shall be permitted to remain."

It will be observed, that the treaty recognizes the right of the Chinese to change their *home* and *allegiance*, and to visit this country, and to become *permanent residents* thereof; and as such residents, it guarantees to them all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation. Therefore, if the State can restrain and limit the Chinese in their labor and pursuits within its limits, it may do the same by the subjects of Great Britain, France or Germany.

True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the State, notwithstanding the treaty, may prevent the Chinese, or the subjects of Great Britain, from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment, or working at any kind of labor.

Nor, can it be said, with any show of reason of fairness, that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their *home*, and expressly permits them to become *permanent residents* here; and this necessarily implies the right to *live*, and to *labor for a living*. It is difficult to conceive a grosser case of keeping the word promise to the ear, and breaking it to the hope, than to invite Chinese to become permanent residents of this country, upon a direct pledge that they shall

enjoy all the privileges here of the most favored nation, and then to deliberately prevent them from earning a living, and thus make a proffered right of residence a mere mockery and deceit. In *Chapman vs. Toy Long*, (4 Saw., 36,) this Court, in considering these provisions of this treaty, said: "The right to reside in the country with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers."

Whether it is best that the Chinese or other people should be allowed to come to this country without limit, and engage in its industrial pursuits without restraint, is a serious question, but one which belongs solely to the National Government. Upon it there has always been a difference of opinion, and probably will be for years to come.

But, so far as this Court, and the case before it is concerned, the treaty furnishes the law, and with that treaty, no State or municipal corporation thereof can interfere. Admit the wedge of State interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty, and overriding the treaty-making power altogether. But it is not necessary to consider further this feature of the case; because, this demurrer must be sustained upon other grounds.

These complainants cannot jointly maintain this suit. There is no privity of interest between them. They are neither partners nor co-contractors. If either has a cause of suit, it is on account of his separate contract with the city concerning the improvement of distinct streets, or parts thereon. They have no common interest in the subject or object of the suit, but assert distinct and several claims against the defendant, growing out of distinct and several contracts, and matters relating thereto. The complaints are misjoined, and the bill is so far multifarious. *Yeaton vs. Lenox*, 8 Pet., 126; *West vs. Randal*, 2 Mass., 200; *Stor's Eq. P.*, §§ 279, 283, 544.

On the argument of the demurrer, it was sought to be maintained, that the complainants and other persons not

named therein, who, like the complainants, are engaged in taking and performing contracts for the improvement of streets, constitute a *class*, called contractors; who, therefore, have a common interest in the subject of this suit, and that such being the case, a bill may be maintained by one or more for the benefit of the whole, as in the case of a creditor's bill, or a bill by the part of the crew of a privateer against prize agents for an account.

But, there is no analogy between these cases and the one under consideration. All persons engaged in making street improvements may have an interest in the *questions* involved in this litigation, but they have no interest in the *object* of this or any suit to enjoin the defendant from enforcing the act against Chinese labor, unless they are actual and proper parties to it. Persons engaged in making street improvements under several and distinct contracts with the city, are not, therefore, a class of persons having a common interest in the subject of street improvements, concerning which, any one or more may sue for the whole. (Story Eq. P., §97 *et. seq.*; Adams Eq. §319.)

Neither does it appear, that the matter in dispute here exceeds in value the sum of \$500. The matter in dispute is the alleged right of the complainants to perform the two several contracts which they have taken, for the improvement of the streets, without being prohibited from employing Chinese labor. The injury which they may sustain by reason of the act being enforced against them, is the only practical test of the value of the matter in dispute. The bill alleges, that this will be more than \$1,000; but the allegation is vague and uncertain, and the estimate appears to include not only the loss which may arise upon the contracts, which the complainants now have, but others which they may hereafter undertake.

Again, it is easy to see how the Chinese, who are excluded from a certain field of labor by this act, and the property holders, who, notwithstanding the pretense in the emergency clause, that it was made for their benefit, are thereby compelled to pay the increased cost of improving the streets

adjoining their property, are injured by the operation of it; but the case of the contractor is different. If, as is assumed, the exclusion of Chinese labor increases the cost of the work, then, presumably, the contractor gets more for doing it. No one is bound to take a contract to improve the streets; and it being understood when the contract is let, that Chinese labor shall not be employed, the reasonable inference is, that parties make their bids accordingly.

The demurrer is sustained and the restraining order vacated.

J. G. Chapman, for the Complainants.

F. O. McCowan and *J. C. Mooreland*, for the Defendant.

Supreme Court of the United States.

DECEMBER TERM, 1865.

[Nos. 81 and 146.]

THE UNITED STATES, APPELLANTS,

VS.

JOSEFA DE HARO *et al.* AND D. MAHONEY, INTER-
VENOR, (IN THE CASE OF JOSEFA DE HARO *et als.*,) APPEL-
LANT, VS. THE UNITED STATES.

Appeal from the District Court of the United States for the Northern District of California.

Mr. Justice GRIER delivered the opinion of the Court.

The only question on this case is, as to the location of the half league confirmed to the heirs of De Haró. The boundaries, as described in the *deseño* annexed to the grant, would include a much larger quantity, all of which was claimed by the heirs. The District Court, affirming the decision of the Board of Commissioners, confirmed their title to the extent only of "*half a square league, being one league from north to south, and half a league from east to west*, to be located according to and within the calls of the original grant,

etc., regard being had to the occupation of the original grantee and the ancestor of the present claimant."

While the case was pending before the Board, a preliminary survey was made, at the suggestion of the heirs, by the Surveyor General. This survey exhibited a plat not only of the outside boundary of the *deseño*, but also those of the half league selected out of the whole, in case they could get no more. In 1853, the Surveyor caused the *sobrante* or over-plus land outside of the half league to be surveyed into sections as public lands. These sections have been settled and improved by parties claiming under the Government. On the 18th June, 1862, the District Court, after a full hearing of the parties, ordered a survey to be made in accordance with the election of the claimants made in 1853, "as evidenced by the plat of a survey of said lands by Leander Ransom, United States Deputy Survey," etc. The question whether such an election had been made was disputed, and fully examined by the Court, as is shown by the opinion of the learned judge on the record. His reasons for the conclusion he arrived at need not be repeated. Suffice it to say, they fully demonstrate the correctness of the order made by the Court.

The survey of Ransom conformed to all the calls of the decree, except that it did not include an abandoned improvement and building once made by Galindo, the original grantee. De Haro, who purchased from him, made his settlement and possession on another portion of the tract described in the *deseño*. He certainly had a right to do so; and his heirs, in selecting the best land for their half league, had a right to exclude the abandoned possession of Galindo. The land selected by them included the "actual occupation of their ancestor," and was in the form prescribed by the decree of the Court. To include the abandoned occupation of Galindo, it would not conform to the other calls of the decree.

A survey, made according to this order or decree, ought to have satisfied all parties, as it did justice to all concerned.

But, as nine years had elapsed since the Ransom survey

was made, the state of the country in this region was much changed, and a new party intervened. Mahoney had purchased the title of the heirs of De Haro and the claimants under the United States had made valuable improvements. If this new party could set aside the election made by those claimants, it is not doubted he could have made a selection more satisfactory to *himself*, at the expense of the other claimants.

Soon after the date of this order or decree of the Court, David Mahoney intervenes and petitions the Court for a rehearing. In this petition he impugns the decision of the Court as to the Ransom survey, denies that it was sanctioned by the heirs, and alleges fraud in the "*sectionising*" the lands by the public officers.

The Court, on this petition, reconsidered their decree, and made another on the 27th of June, 1863, according to another survey made on the 15th of June preceding. This survey is objected to by all the parties interested. By the United States, because it covers land claimed by settlers and purchasers from the Government; and by Mahoney, because it does not include more of the land so occupied and improved.

This change of location is made, not because the selection made in 1853 was not made by consent of the heirs, or because the fraud charged upon the public officers was proved, or ought to effect the title of those claiming under the Government, but because the land selected by them did not include the abandoned settlement made by Galindo.

Now, if the heirs had a right to select within the boundaries of the original *deseño*; if their selection conformed with all the other calls of the decree, as to the length and breadth of the half league, and included the portion occupied by De Haro, their ancestor, no one had a right to complain if they rejected the abandoned occupation of Galindo. A tract, one league from north to south, and half a league from east to west, including the lands occupied by De Haro, cannot be made to include the other calls of the decree.

We are of opinion, therefore, that the order of decree

made on the 27th June, 1863, should be set aside, and that made on the 18th day of June, 1862, be confirmed, and that the appeal of Mahoney be dismissed.

I, Daniel Wesley Middleton, Clerk of the Supreme Court of the United States, do hereby certify that the preceding two printed pages contain a true copy of the opinion of said Supreme Court in the cases of *The United States*, appellants, vs. *Josefa de Haro et als.*, and *D. Mahoney*, intervenor. (in the case of *Josefa de Haro et als.*, appellants; vs. *The United States*, Nos. 81 and 146 of December Term, 1865,) as the same remains on the records of said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this tenth day of February, A. D. 1866.

[SEAL]

D. W. MIDDLETON,

Clerk Supreme Court United States.

Supreme Court of Nevada.

OCTOBER TERM, 1878.

GLEESON vs. MARTIN WHITE MINING CO.

1. MINES AND MINING RIGHTS—LOCATION AND MARKING OF BOUNDARIES OF CLAIM—HOW MADE—COMPLIANCE WITH ACT OF CONGRESS, MAY 10, 1872. The location of a mining claim on a vein, must be made by taking up a piece of land to include the vein; and the boundaries and extent of the claim must be plainly defined by stakes or marks on the ground.
2. *Ibid.*—VEIN—SURFACE—LINES. The vein is the principal object of the locator, and the surface claim ought always to conform to its course; the end lines ought to be parallel and at right angles to the side lines.
3. *Ibid.* Where the locators of a mine having a monument, notice and work at the discovery point, post two stakes along the centre line of the claim, the stake being at the ends of the claim, and on a line with the croppings of the vein and discovery point. *Held*, a sufficient marking of the location of the claim, so that its boundaries can be readily traced.

Appeal from the District Court of White Pine County.

Action to determine the right of possession of certain mining ground. The plaintiff derails title from the location of claim called the Shark, and the defendant is the grantee of the location of the Paymaster. Both claims were located on the same ledge. The principal question in the case is as to the validity of the Paymaster location.

Thomas Wren, H. K. Mitchell, Crittenden Thornton, and Garber & Thornton, for Appellant.

A. M. Hillhouse and B. P. & H. N. Clement, for Respondent.

BEATTY, J.

(*After stating the facts.*) The questions involved in this case have led to a very thorough and elaborate discussion of the mining laws of the United States, and particularly of the Act of Congress of May 10, 1872, (R. S. § 2319 *et seq.*), under which these claims were located, and which embodies the most important features of the mining legislation. One of the imperative requirements of the statute—an indispensable condition precedent of a valid location—is that it shall be “distinctly marked on the ground so that its boundaries can be readily traced.” (R. S. § 2324.) Counsel for appellant contend, that the location is of the surface, and that stakes at the corners of the claim are essential. Counsel for respondent insist, that the location is of the vein, as the principal thing with the surface as a mere incident, and that stakes to define the limits of the claim upon the vein are sufficient. The vein is the principal thing, in the sense that it is for the sake of the vein that the location is made: the surface is no value without it; no location can be made until a vein has been discovered within its limits, and the surface must, or at least ought to be located in conformity with the course of the vein. (R. S. §§ 2320, 2322, 2325.) The vein originally discovered, and for the sake of which the location is made, is lumped in with other mineral deposits that may happen to exist within the limits of the surface claim, and no part of it is granted, except that part the top or apex of which lies inside of the surface lines extended downward vertically. A location on a vein must be

made by taking up "a piece of land" to include it. No other means are provided, and it is only upon condition of complying with the law that the locator becomes entitled to anything. The discoverer of a vein may be allowed a reasonable time to trace its course before being compelled to define his surface claim, and in the meantime may be protected in his claim to 1,500 feet of the vein, but his location will never be complete until his surface claim is defined.

So far, we agree entirely with the views of counsel for appellant; but, although we are satisfied that a location must be of a surface claim, and that the boundaries and extent of the claim must be plainly defined by stakes or marks on the ground, it does not appear to be a necessary consequence, that the least admissible marking is by posts or monuments at all the corners of the claim.

We are aware that the Commissioner of the Land Office has recommended the planting of posts at the corners, and the erection of a sign-board with the name of the claim, the names of the locator, etc., at the location point, and undoubtedly, a compliance with these recommendations would be sufficient to satisfy the law in this particular; but at the same time, we think, it may be satisfied by something less. There is, after all, something in the fact, that it is a mining claim and not an agricultural claim that is being located, and some account should be taken of the customs, habits and circumstances of a mining community in determining what is a sufficient marking of a mining claim. The vein is always the principal object that the locator has in view; it is generally, after location and work at the location point, a conspicuous feature of the locality; it is the first thing that attracts the attention of mining men; the surface claim by which it is to be located, ought to confirm to its course; the end lines must be parallel, and, as they ought to confirm to the dip of the ledge as nearly as practicable, they ought to be at right angles to the side lines, so that if the centre line of the claim is once established, the boundaries are thereby fixed, and may be readily traced.

The object of the law in requiring the location to be

marked on the ground, is to fix the claim—to prevent floating or swinging—so, that those who in good faith are looking for unoccupied ground in the vicinity of previous locations, may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. We concede, that the provisions of the law designed for the attainment of this object are most important and beneficent, and that they ought not to be frittered away by construction. But, it must be remembered, that the law does not in express terms require the boundaries to be marked. It requires the location to be so marked, so that its boundaries can be readily traced. Stakes at the corners do not mark the boundaries; they are only a means by which the boundaries may be traced. Why not, then, allow the same efficacy to the making of a centre line in a district where the extent of a claim on each side of the centre line is established by the local rules? It would be safer, and therefore better, to comply with the recommendations of the land office, and erect stakes at the corners of the claim, but if the grand object of the law is attained by the making of a centre line, we can see no reason why it should not be allowed to be sufficient.

In this case, the locators of the Paymaster marked the centre line of their claim on the 20th of October, 1872. No miner, no man of common intelligence, acquainted with the customs of the country, could have gone on the ground and seen the monument, notice and work at the discovery point, and the two stakes—one 300 feet southeast of the location monument, marked "Southeasterly stake of Paymaster," the other 1200 feet northwest of the location monument, and marked "Northwesterly stake of Paymaster"—in a line with the croppings and discovery point, without seeing at a glance that they marked the centre line of the claim. By the rules of the district, and the laws of the land, he would have been informed that the boundaries of the claim were formed by lines parallel to the centre line, and 300 feet distant therefrom, and by end lines at right angles thereto. With this knowledge, he could have traced the boundaries, and if such

was his wish, ascertained exactly where he could locate with safety. We conclude, therefore, that the Paymaster location was sufficiently marked on October 10, 1872. At that time the Shark location had not been marked in any way, and whether the law allows a locator a reasonable time, or not to mark his boundaries—protecting his full claim in the meanwhile—the same result equally follows. If the Paymaster was not marked within a reasonable time after discovery, then, certainly, the Shark was not, for the first was marked within three months, and the latter not until more than eighteen months after discovery; so that if the Shark claim was lost by the failure to mark its location within a reasonable time, and such time is allowed, then the Shark was thereby excluded. If no time for tracing is allowed, and the first to mark his boundaries is first in right, then the Paymaster location holds the claim, because it was first defined by monuments on the ground.

Judgment affirmed.

HAWLEY, C. J., specially concurring.

Recent Decisions.

PRACTICE.

Motion to Dismiss Complaint—Demurrer. A motion to dismiss a complaint at the trial, on the ground that it did not state facts sufficient to constitute a cause of action, was denied on the ground, that the remedy was by demurrer. *Held*, error. Code, § 148; (*Scofield vs. Whitelegge*, 49 N. Y., 259; *Coffin vs. Reynolds*, 37 *Id.*, 640; *Emery vs. Pease*, 20 *Id.*, 62.) Where a fulfillment of a condition precedent is essential to the creation of the liability, the fulfillment must be alleged. (*Munger vs. Shannon*, 61 N. Y., 251-266.) The denial in the answer of the receipt of the moneys alleged, does not supplement the complaint. (*Scofield vs. Whitelegge*, *supra*; *Bate vs. Graham*, 11 N. Y., 237, distinguished.) Section 162 of

the Code, providing for setting forth a copy of the instrument, with an allegation of the amount due thereon, does not apply to a case where the indebtedness depends on a condition precedent. (*Conklyn vs. Gandell*, 1 Keyes, 231.) The question of dismissal is not one of discretion, but of strict right. The correctness of the ruling must be tested by the complaint as it stood; not as it might have been changed by amendment. Judgment reversed and new trial. (*Tooker vs. Arnoux*.) Opinion by RAPALLO, J.

[Decided March 18, 1879.]

REPLEVIN SALE.

Delivery Without Payment—Foreign Statute. Williams bought of plaintiffs, at Savannah, Georgia, 118 bales of cotton, giving therefore his two checks on Bryan & Hunter, of the same place, having previously put the latter in funds by his draft on defendants to their order for \$4,500, and otherwise. Plaintiff delivered sixty bales to Williams, and it was shipped by Williams, the bill of lading being in his name, and having attached thereto the draft indorsed by B. & H. Defendants paid the draft on presentation, the amount being more than the price of the sixty bales, and the transaction being according to their custom with Williams, and received the cotton without knowledge of any claim on it. One of the checks on B. & H., being post-dated, was dishonored, and plaintiffs brought replevin for forty-five bales, part of the sixty, relying on a statute of Georgia, which provides that "cotton, rice and other products sold by planters and commission merchants on cash sale, shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, although, it may have been delivered into the possession of the buyer." *Held*, that the action could not be maintained. Defendants were *bona fide* purchasers, and if the statute were part of the contract, the sale was still absolute and unconditional, and title passed to the defendants. The statute simply made the delivery con-

ditional, and affected nothing but the delivery, and could not affect the rights of a *bona fide* purchaser in this State. When goods are sold payable in cash, or by note on delivery, if delivery is made without demand, or the notes or cash, the presumption is that the condition is waived, and a complete title vests in purchaser; but this presumption may be rebutted by proofs of facts, or declarations and circumstances showing an intention that the delivery shall not be considered complete until performance of the condition, and the question of intention is one of fact. But after actual delivery be condition, a *bona fide* purchaser from the vendee obtains a perfect title. (*Smith vs. Lyons*, 5 N. Y., 41; *Kernan vs. McKean*, 25 Barb., 474; *Beaver vs. Lane*, 6 Duer. 238.) Though a voluntary assignee of the purchaser does not. (*Haggerty vs. Palmer*, 6 Johns., Ch. 438.) The statute of Georgia having no operation here as law, its only effect can be to place the parties in the same position as if it had been stipulated at the time of the delivery to Williams, that such delivery should be conditional upon payment, and we must apply to the case the law of this State, which protects *bona fide* purchasers from one to whom goods have been conditionally delivered against the claim of the original vendor. (*Rawls vs. Deshler*, 3 Keyes, 572.) Judgment affirmed. (*Cornner vs. Cunningham*.) Opinion by RAPALLO, J.

[Decided May 27, 1879.]

Pacific Coast Law Journal.

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AUGUST 16, 1879.

No. 25.

Current Topics.

THE California bar has sustained a grievous loss in the death of one of its oldest, brightest and most estimable members—the late General JOHN R. McCONNELL—who recently died at Salt Lake City, Utah. Since the pioneer days of California, he has been widely known throughout the State; and was one of the earliest settlers of Virginia City. As a lawyer, he ranked with the foremost on the coast. He was a profound student; a close reasoner; an able debator, and a courteous gentleman. To his rare gifts of nature, were added a refined and cultivated taste, and a chivalric, genial bearing possessed by very few men. His literary attainments and personal magnetism made him the delight of all circles in which he moved; and he will long be unforgotten in the memories of many friends, both in this State and in Nevada. Gen. McCONNELL seemed to have mastered all branches of human learning, and was never more at home than when amid the confraternity of social friends, on which occasions the elegant emanations of his prolific mind appeared inexhaustible, and flowed as naturally as do streams unto the ocean. He was a native of Kentucky, and at the time of his decease in the fifty-third year of his age. He had been in feeble health for several years preceding his death. In life, he passed through the multitude as a man who neither disdained the wants of the people, nor yet was in anything tickled with their vanity. *Vita sine literis mors est.*

Supreme Court of California.

[No. 6,377.]

SHARPSTEIN, APPELLANT,

VS.

PRISCILLA FRIEDLANDER, EXECUTRIX, RESPONDENT.

TRUST—CONTRACT. An agreement as follows: "In consideration of professional services rendered for me by J. R. S., an attorney at law, in obtaining a settlement of a claim, by which settlement I obtained two promissory notes, payable ——— I hereby agree to hold said notes, and to collect them when they shall become due; and pay to said J. R. S., one half of any sum, or sums that I may receive on said notes, or either of them" creates a simple contract liability and not one in the nature of a trust.

Appeal from Fifteenth District Court, city and county of San Francisco.

The complaint alleges, that on January 14th, 1878, one I. Friedlander, made, executed and delivered to plaintiff an instrument in writing, of which the following is a copy:

"In consideration of professional services rendered for me by J. R. Sharpstein, an attorney at law, in obtaining a settlement of a claim which I had against Robert Sheehy, by which settlement I obtained from said Sheehy, his two promissory notes for \$5,000 each, payable respectively, on September 1, 1878, and July 1, 1879, thereby agree to hold said notes, and to collect them, and each of them, when they, and each of them shall become due, or as soon thereafter as I reasonably can, and to pay to said Sharpstein, one half of any sum, or sums that I may receive on said notes, or either of them."

I. FRIEDLANDER.

Dated San Francisco, January 14, 1878.

That on, or about July 1st, 1878, said I. Friedlander, without the consent or knowledge of plaintiff, transferred, endorsed and delivered for value to the Nevada Bank, at the city and county of San Francisco, one of said above mentioned promissory notes, to wit: the one payable on the 1st

September, 1878; and on said 1st day of September, 1878, said Robert Sheehy paid said note in full to said bank.

That on July 11th, 1878, said I. Friedlander died, leaving a will, appointing the defendant his executrix.

That the defendant, by an order of the Probate Court of the city and county of San Francisco, duly made the 29th of July, 1878, was appointed, and is now executrix of said will.

That as executrix of said will, defendant is in possession of said promissory note, payable on said July 1st, 1879, as aforesaid.

That each of said notes was made payable to the order of said I. Friedlander, and said note payable on July 1st, 1879, was never endorsed by him.

That on September 10th, 1878, at the city and county of San Francisco, plaintiff demanded from defendant said note, payable on said July 1st, 1879, but defendant refused to deliver the same to plaintiff, and still neglects so to do.

Wherefore, plaintiff prays, that it be adjudged and decreed, that said I. Friedlander held a one half interest in said promissory notes in his own right, and the other half in trust for plaintiff; that the said transfer of one of said notes to the Nevada Bank by said I. Friedlander, was in violation of said trust; that the plaintiff is entitled to said other promissory note now in possession of the defendant; that defendant holds said note in trust for plaintiff; and that said defendant transfer the same by endorsement, assignment, or otherwise, as the Court may direct to the plaintiff, and for such other relief, etc.

To which complaint defendant demurred upon the ground, that it does not state facts sufficient to constitute a cause of action, and—

Answering, denied each and every allegation in the complaint.

The demurrer was sustained, and judgment rendered thereon for defendant, and plaintiff appealed.

J. R. Sharpstein, Appellant in person.

Appellant in his brief, argued that the writing (in complaint,) constituted an assignment of one undivided half-in-

terest in the notes; and the agreement of Friedlander to hold and collect them when due, and to pay appellant one half of any money received, constituted Friedlander a trustee for appellant as to his one half interest in said notes; and that such was evidently the intention of the parties.

That there is no particular formality required, or necessary in the creation of a trust; any agreement or contract in writing, made by a person having the power or disposal over property, whereby he directs that a particular parcel of property, or a certain fund shall be for the benefit of another, in a Court of Equity raises a trust in favor of such other person against the person making such agreement; or any person claiming under him voluntarily, or with notice. 1 Perry on Trusts.

In order to constitute an assignment of a debt, or other cause in action in equity, no particular form is necessary. Indeed, any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of that fund. 2 Story's Eq. Jur., see 1047.

The assignment of a debt, secured by collaterals, gives to the assignee the full benefit of them, unless otherwise agreed between the parties. 2 Story's Eq. Jur., Sec. 1047, (a.)

The notes were left in the hands of the assignor for a particular purpose specified in the agreement. As he appropriated one of them to his own use in violation to the agreement, the other equitably belongs to the assignee.

The notes were given for equal amounts. But the one transferred by the assignor, matured ten months earlier than the other and was consequently, the most valuable of the two. The assignment is of one half of whatever sum, or sums which may be collected upon said notes. The assignor obtained his half by the transfer of one of the notes. Does not the remaining half equitably belong to the assignee? 45 Cal., 564; 15 Har. U. S., 415; 2 Johns. Ch., 107, 108; 2 Perry on Trusts, Sec. 844.

The case is to be treated precisely as it would be were the assignor alive. If he were, would not a Court of Equity decide, that he having appropriated one half of the fund, held

the note representing the other half in trust for the assignee?
Boyle, Barber & Scripture, Attorneys for Respondent.

The agreement set forth in the complaint, creates no trusts as to the notes, or any part of them. It is simply a contract, by which, in consideration of services rendered, the deceased promised to pay certain sums of money on the happening of a future event. The remedy for a violation of it, is by an action of assumpsit.

It could have been presented to the defendant as a demand against the estate of the deceased, and established as any other legal demand. Code Civil Procedure, § 1500.

PER CURIAM.

When the note mentioned in the agreement fell due, and was paid, the plaintiff, by the terms of the agreement, had a valid claim against the estate of Friedlander for the sum of \$2,500, the one half of the amount received upon this note. As such, this could only be made effectual by presentation to the executrix, as in the case of ordinary money demands. It is the duty of the executrix to collect the latter note when it shall fall due, and in that event, the plaintiff will have a valid claim against the estate for the moiety of the amount received, dating from the time of its receipt. We think the complaint discloses a simple contract liability on the part of Friedlander, and not one in the nature of a trust.

Judgment affirmed.

HUSBAND'S LIABILITY FOR WIFE'S CONTRACTS.

It may not be easy to reconcile all the decisions upon the subject of a husband's liability for his wife's contracts. In some of them the true ground for her authority—that of agency—may not have been kept distinctly in view. Indeed, the prevailing custom among legal authors on contracts to treat the subject under the head of "Married Woman," rather than under "Agency," where it more properly belongs, may have tended to mislead the reader, as to the true source of her authority. But, recognizing now the doctrine

in its fullest extent, that a wife has not ordinarily, as wife, any original and inherent authority to charge her husband by her contracts—a power to endure, so long as the relation endures—but that she can bind him only as his agent, express or implied—implied in fact, or implied in law—let us, for convenience sake, consider the subject in four classes of cases:

1. During cohabitation; 2. When she has left him through his fault; 3. When they separate by mutual consent; 4. When she leaves without just cause.

1. During cohabitation. And here we should exclude all those cases where an implied agency *in fact*, is created, as by having paid former bills without objections, or when the husband sees or knows of the delivery and consumption of the goods without any disapprobation; or when in any way, he ratifies and confirms his wife's purchases—for these circumstances might create a tacit agency, whether the purchases were made by a wife, a son, or a servant. They, therefore, shed no true light upon the question we are now considering, viz., the extent of her implied agency in law. And many of the apparently conflicting cases on this subject may be reconciled on the ground that there was evidence of some tacit agency in fact. It may therefore be assumed, that during cohabitation, a wife has ordinarily a *prima facie* agency to purchase on her husband's credit, necessary supplies for herself and family. This is based largely upon the fact, that it is customary to intrust a wife with the management of the household affairs, and to that extent, tradesmen have a right *prima facie* to consider her authorized. The authorities on this point are so uniform as to render their citation unnecessary. And see *Jewsbury vs. Newbold*, 26 L. J. Ex. 247 (1857,) not elsewhere reported; *Jolly vs. Rees*, 15 C. B. (N. S.) 528. But, this agency is limited to articles that are reasonably necessary for her or her family, and does not extend to business contracts, nor to purchases of extravagant articles for herself or children, or gifts for her friends. See *Lane vs. Ironmonger*, 13 M. & W. 367; *Seaton vs. Benedict*, 5 Bing. 28; *Montague vs. Benedict*, 3 B. & C. 631; *Philipson vs. Hay-*

ter, Law Rep. 6 C. P. 38; *St. John's Parish vs. Bronson*, 40 Conn. 75; *Sutter vs. Mustin*, 50 Ga., 242. And the agency to purchase necessities even, is only *prima facie*, and may be disproved by the husband, by showing that he had abundantly supplied the house with all things necessary and suitable; or that he had furnished his wife with ample ready money for the purpose, and requested her not to purchase on credit; or had provided suitable places where all things necessary could be had, and forbidden her to purchase elsewhere. The husband is still, in view of the law, the head of the house; and has a right to control the affairs of his own household. He has a right to say when and how his house shall be supplied; though, of course, he cannot repudiate his obligation altogether. But, as long as he does his duty in this particular, there is no duty to be done for him by another; and therefore, there is no one authorized by law to do it. The modern cases of *Woodward vs. Barnes*, 43 Vt. 330; *Read vs. Teakle*, 13 C. B. 627; *Reneaux vs. Teakle*, Ex. 680; *Jolly vs. Rees*, 15 C. B. (N. S.) 628; *Holt vs. Brien*, 4 B. & A. 252; *Cromwell vs. Benjamin*, 41 Barb. 560; *Heriott vs. Bagioli*, 9 Bosw. 578; *Richardson vs. Dubois*, Law Rep. 5 C. P. 51; *Keller vs. Phillips*, 39 N. Y. 351; 40 Barb. 390; *Burr vs. Armstrong*, 56 Mo. 577; *Harrison vs. Grady*, 12 Jur. (N. S.,) 140; 14 Weekly Rep. 139; *Shoolbred vs. Baker*, 16 Law T. Rep. (N. S.) 359; *Ryan vs. Nolan*, Ir. R. 3 C. L. 319, fully support these views, though doubtless there may be some authority the other way. *Ruddock vs. Mursh*, 1 H. & N. 601, in which the husband was held liable for necessities supplied and consumed in his absence, although he had left sufficient money with his wife for that purpose, is apparently contrary to all sound rule on that subject.

2. Where she leaves him through his fault. Here she carries her implied agency with her, and has the same power to supply her own wants on his credit as before. *Hancock vs. Merrick*, 10 Cush. 41; *Mayhew vs. Thayer*, 8 Gray, 172; *Reynolds vs. Sweetzer*, 15 Id. 78; *Emery vs. Emery*, 1 Y. & J. 501; *Hultz vs. Gibbs*, 66 Pen. St. 360; *Houleston vs. Smyth*, 3 Bing. 127; *Brown vs. Ackroyd*, 5 El. & Bl. 819; *Harrison vs.*

Grady, supra; Forristull vs. Lawson, 34 Law T. Rep., 908 (1876). But, if he still furnishes her abundant means to do so, without pledging his credit, she has no right to use the money otherwise, and purchase on his name. And if the husband authorizes her to buy at certain places, where she can be suitably supplied, and forbids her to do so at some particular place, he has a right to do so, and is not bound by her contracts at that place, in violation of his express orders, when there was no reasonable need of her so contracting; certainly, after notice of the facts to the party seeking to charge him. Her whims are not the criterion of her power, but her needs only; and he has a right still to dictate who his creditors shall be, provided always, he does not unreasonably limit her in her range of choice. See *Mott vs. Comstock*, 8 Wend., 544; *Kemball vs. Keyes*, 11 *Id.*, 33; *Misen vs. Pick*, 3 M. & W., 481; where the husband was living apart from his wife in adultery, but allowed, and paid her a sufficient sum for her maintenance, he was held not liable for her board and lodgings, though the plaintiff had no notice of the allowance. But if the allowance he makes her is inadequate, or if he does not pay it promptly, she still retains her agency to purchase on his credit. *Nurse vs. Craig*, 5 B. & P., 148; *Baker vs. Sampson*, 14 C. B. (N. S.) 382; *Collier vs. Brown*, 3 F. & F., 67.

3. When they separate by mutual consent. And here the case of *Eastland vs. Burchell*, (L. R. 3 Q. B. D., 432, 47 L. J. Q. B. 500,) no doubt, lays down the modern English rule. If she has by articles of separation deliberately agreed to accept a stated sum in full for her support, and stipulated not to contract on her husband's name, she cannot do so, even though the sum paid proves inadequate. Her agency is terminated. She has by her own act abrogated it. And though the tradesman who supplies her is ignorant of the facts, yet he trusts her at his peril. She cannot give another rights she does not herself possess. See *Mallalien vs. Lyon*, 1 F. & F., 431.

In *Johnson vs. Sumner*, (3 H. & N. 261, 1858,) the defendant and his wife had separated by mutual consent, and with the

agreement that she should have £200 a year, for her own use, which she had been receiving during her marriage under a covenant from her mother to that effect. The plaintiff had supplied her, on her own order, with dresses and articles of millinery to the amount of £160, without knowing she was married, and without making any inquiry about it, but having afterward ascertained the fact, he brought an action against the husband for it. Upon these facts, it was held there was no evidence to warrant a jury in finding for the plaintiff, and he was nonsuited, which was confirmed by the Court of Exchequer, upon the ground, that the question was one of the wife's authority, that the creditor must make that out; that to do so, he must show if they were living separate and apart, she was doing so under circumstances giving her an authority to pledge his credit, and if she had agreed to accept an allowance, which was paid, it was the plaintiff's duty to show such allowance inadequate, and that not being shown, there was no evidence to charge the husband. In *Biffin vs. Bignell*, (7 H. & N. 877, 1862), the husband allowed and paid his wife, as per agreement between them, twelve shillings a week, and she boarded with the plaintiff, who claimed £36 for three months' board and lodging. BRAMWELL, J., told the jury, that if the defendant's wife was living apart from him under an agreement by which she was to receive a weekly allowance, which was paid, she could have no authority to pledge his credit, and the defendant would be entitled to their verdict. And this ruling was affirmed, BRAMWELL repeating, that even if the provision was inadequate, the wife would have no such authority, so long as she lived apart under such a conditional assent on the part of the husband, conditional upon the fact, that she would accept the provisions in full of all claim for support. It is not clear the American rule goes quite so far. If the amount so paid is found adequate to her wants by the jury, it is clear, she has no authority to go beyond it and purchase on credit. One of the earliest and best considered cases in America on this point, is *Cany vs. Patton*, 2 Ashm., 140, which agree with the English rule laid down in *Hodgkinson vs. Fletcher*, 4 Camp., 70; *Holder vs.*

Cope, 2 C. & K. 437; *Reeve vs. Conyngham*, Id. 444; *Emmett vs. Norton*, 8 C. & P., 506; where the adequacy of the allowance seems to have been considered material. And see *Fredd vs. Eves*, 4 Harr., 385. So it was held in *Pidgin vs. Cram*, 8 N. H., 350, that where they separate by mutual consent, and the husband makes a contract with a suitable person to support his wife in a suitable manner, she cannot leave that place without any just cause and pledge her husband's credit elsewhere for her support. And see *Stevens vs. Story*, 43 Vermont, 327. Though some hold, that even in such case, if the wife has sufficient means of *her own*, she cannot purchase on her husband's credit; for if she chooses to live separate and apart, without his fault, and by mutual consent, she can only charge him in case of actual necessity; and if able, she must pay her own bills. See *Litson vs. Brown*, 26 Ind., 489; *Dixon vs. Harrell*, 8 C. & P., 717; *Liddlow vs. Wilmot*, 2 Stark., 86; *Cliford vs. Layton*, Mood & Mal., 102; 3 C. & P., 15. Of course, if he does not promptly pay the stipulated allowance, she still retains her agency as before. *Beale vs. Arabin*, 36 L. T. Rep. (N. S.) 249; not elsewhere reported, but a valuable case on the point. *Baker vs. Barney*, 8 Johns., 57.

4. Where she leaves by her own fault. And here all agree, she leaves her agency behind her, especially when she has committed adultery. No matter what her necessities may be; no matter how innocent or ignorant the person who supplies her may be of the circumstances of the separation, she has no power to bind her husband for even the necessities of life. (*McCutchen vs. McGahay*, 11 Johns., 281; *Cooper vs. Lloyd*, 6 C. B. (N. S.) 519; *Henderson vs. Stringer*, 2 Dana, 292; *Hunter vs. Boucher*, 3 Pick., 289; *Oinson vs. Heritage*, 45 Ind., 73; *Bevier vs. Galloway*, 7 Ill., 517.) And this shows that her power does not spring solely and absolutely from her relation as wife—for she is such still—but from some other principle, which ought to be kept steadily in view in all these four classes of cases.—*American Law Register*.

Supreme Court of Missouri.

JUNE 2, 1879.

STILLWELL vs. AARON.

PROMISSORY NOTES—DISCHARGE OF INDORSER—EXTENSION OF TIME—CONSIDERATION. A sum of money paid by the maker to the holder, to obtain an extension of time for the payment of a promissory note, whether paid as a bonus, usurious interest, or interest in advance, is a good consideration to support the contract of extension; and a surety who has not assented to such extension will be discharged thereby.

Waters & Winslow and W. P. Harrison, for Appellant.

Hatch and Carr, for Respondent.

HENRY, J., delivered the opinion of the Court.

This was a suit on a note for two thousand dollars, executed by Blair & Steers, and the defendant John Aaron, dated February 18, 1873, payable one hundred and eighty days after its date to William Steers, and by him endorsed to the plaintiff. The note was given for money borrowed by Blair & Steers of Stillwell; the defendant Aaron was but the surety of the firm, and this was known to Stillwell when he received it. The evidence on the part of the defendant tended to show that when the note became due, Blair & Steers paid thereon \$1,000, and that on consideration of \$10, then paid to Stillwell, he agreed with William Steers, one of the firm of Blair & Steers, and the payee and indorser of the note, to extend the time for payment of the balance one month, and that John Aaron was neither apprised of, nor consented to, the extension. For plaintiff, the Court instructed the jury as follows: "Although the jury may believe, from the evidence, that Blair & Steers were the principal debtors on the note, and that Aaron was only the security thereon, and that at maturity of said note Stillwell was the holder of said note, and as such he did, in consideration of \$10 paid him by Steers, one of the firm of Blair & Steers, agree with Steers to extend the time for the

payment of said note, for a definite time, without the consent of Aaron; yet, if they find from the evidence, that said \$10, paid by Steers, was paid as interest in advance on said note, for said time, to procure said extension, and was so accepted and received by Stillwell, then the agreement so made by Stillwell did not discharge said Aaron, and the verdict should be for plaintiff." In another instruction, the Court declared that if, at the time of the payment of the \$1,000, it was agreed by plaintiff, and Blair & Steers, in consideration of \$10, then paid by Steers to plaintiff, that the latter would extend the time of payment on the balance due for 30 or 60 days, such agreement did, by operation of law, release defendant from all liability on said note.

There was a verdict and judgment for defendant, from which judgment plaintiff has prosecuted an appeal to this Court.

Many instructions were given and refused, but the foregoing fully present the questions which it is deemed necessary to consider. It has uniformly been held in this State, that if a creditor, for valuable consideration, make an agreement with the principal debtor, which suspends his right of action on the demand for a definite period of time, without the consent of the surety, it operates to discharge the surety. 19 Mo., 263; 27 Mo., 501, 505; 31 Mo., 218; 38 Mo., 490; 57 Mo., 100, 385; 58 Mo., 550; 63 Mo., 45; 65 Mo., 562; *State ex rel. vs. Roberts*, 68 Mo.

The doctrine is stated by SAVAGE, C. J., in *Wood vs. Jefferson County Bank*, (9 Conn., 206,) as follows: "If the creditor, by agreement with the principal debtor, without consent of surety, varies the terms of the contract by enlarging the time of performance, the surety is discharged."

In *Kincaid vs. Yates*, (63 Mo., 45,) it is thus stated: "If the creditor enter into any binding contract, the effect of which will be to give further time to the principal debtor without the consent of the surety, the surety will be discharged."

The contract, or agreement, which the authors of the above extracts had in their minds was not an alteration of

the original contract by erasure of terms from, or, by interlineation, the addition of stipulations to, the original contract. This would release the surety without any reference to the principle under consideration, whether such interlineation or erasure were made for a valuable consideration or not.

It would then not be the contract the surety signed, and he could safely plead *non est factum*, or prove the fact under the general issue, if sued on a contract not under seal. An agreement to extend the time will discharge the surety, whether the agreement is endorsed upon the obligation, or be evidenced by erasure, or interlineation, or by a collateral agreement. The adjudicated cases which support this proposition are innumerable, and nearly all, if not all, that will be subsequently cited in this opinion fully sustain it. Familiar principles of elementary law, we think, may also be safely invoked in its support. "In a case of a simple contract in writing, oral evidence is admissible to show that by a subsequent agreement the *time of performance* was enlarged, or the plan of performance changed." (Greenleaf's Evidence, Vol. 1 Sec. 304.) Neither is the rule, that extrinsic evidence is not admissible to contradict or alter a written instrument, infringed by the admission of oral evidence to prove a new and distinct agreement, upon a new consideration, whether it be substitute for the old, or in addition to, and beyond it." *Ib.* sec. 303.

The agreement when made becomes a part of the original, and just as effectually prevents the creditor from suing before the lapse of time agreed upon as if it were evidenced upon the original contract by erasure or interpolation. The doctrine is broadly stated in Theobald on Principal and Surety, that "the surety is discharged, if without his consent the principal parties make a new agreement inconsistent with the terms of the original agreement, or if they agree to make any alteration either in the terms of the original agreement or in the mode of performing them." In *Rucker vs. Robinson*, (38 Mo., 158,) the Court said: "It is well settled that a covenant not to sue upon a claim cannot be pleaded to, and

presents no bar to an action on the claim, the only remedy of the covenantee being a suit for damages on the covenant or agreement."

We can understand why a covenant not to sue, whether for a definite or indefinite time, might be held not to discharge the surety, although the contrary is held by some Courts of the highest respectability. *Wright vs. Bartlett*, 43 N. H., 548; *Deale vs. Cochran*, 66 N. C., 270.

A covenant not to sue is not necessarily an agreement to extend the time for payment. The debtor, or his surety, notwithstanding a covenant not to sue the principal debtor, could, if he desired, pay the demand before the expiration of the time named in the covenant, and the creditor would be compelled to receive it. Such a covenant neither modifies the original agreement nor changes its terms, but leaves that contract in full force and does not suspend the right of action upon it. Not so, however, as to an agreement upon sufficient consideration to change the time of payment or performance, or any other of the terms of a contract. The contract, wherein it has been so modified, is at an end, and the terms of the new agreement become substituted for so much and a part of the original contract. *Greenleaf, supra*.

The evidence in this case tended to prove an express agreement in consideration of \$10, paid to the creditor for an extension of the time for payment of the balance of the note.

If it were legal interest in advance, the payment thereof was a sufficient consideration to support the express promise.

"In the first place, as to considerations arising from benefit or injury. The principal requisite, and that which is the essence of every consideration, is that it should create some benefit to the party promising, or some trouble, prejudice, or inconvenience to the party to whom the promise is made. Wherever, therefore, any injury to the one party, or any benefit to the other party, springs from a consideration, it is sufficient to support a contract. (Story on Contracts, § 548.) Every party to a contract may ordinarily exercise his own discretion as to the adequacy of the con-

sideration, and if the same be made *bona fide*, it matters not how insignificant the benefit may apparently be to the promisor, or how slight the inconvenience or damage appear to the promisee, provided it be susceptible of any legal estimation." *Ib.*

That interest, paid in advance, is a sufficient consideration to support a contract for the extension of the time of payment of a note, or other money demand, is fully sustained by the following cases: *Smarr vs. Schnitter*, 38 Mo., 479; *Lime Rock Bank vs. Matlett*, 34 Me., 547; *Bank vs. Woodward*, 5 N. H., 99; *Wright vs. Burtlett*, 43 N. H., 548; *Montague vs. Mitchell*, 28 *Ib.*, 485; *Kennedy vs. Evans*, 31 Ind., 258; *Myers vs. First National Bank*, 78 Ind., 258; *Cross vs. Ward*, 30 Ind., 378; *White vs. Whitney*, 51 Ind., 124; *Vilas and Bacon vs. Jones & Pierce*, 10 Paige, 76; *Miller vs. McCunn*, 7 Paige, 441; *Kenningham vs. Buford*, 1 B., Monroe; *Austin vs. Dorwin*, 21 Vt., 38; 72 Ill., 30; 2 N. H., 333; 6 N. H., 504.

In most of the above cases it was held that payment of usurious interest is a sufficient consideration for the promise to extend the time of payment. We are aware that the contrary was held in *Wiley vs. Hight*, (39 Mo., 132;) and in the *Farmers' & Traders' Bank vs. Harrison*, (57 Mo., 503;) but the case principally relied upon to support the ruling, was *Marks vs. Bank of Mo.*, (8 Mo., 318,) in which Judge Scott expressly stated, as the ground of that decision, "that the usurious interest might have been recovered back the next moment after it was paid."

Such is not the law at present in this State. (*Ransom vs. Hayes*, 39 Mo., 445; *Butherford vs. Williams*, 42 Mo., 18.) If usurious interest be paid, it cannot be recovered back, and if one make an agreement to extend the time of payment of a note, or other money demand in consideration of usury paid, the agreement is binding upon him. If the consideration be a promise to pay usury, as this promise could not be enforced, and would not maintain an action, the contract would not bind the other party. The distinction is between executed and executory contracts. In *Faucett et al. vs. Freshwater*, (31 O. St., 637,) an agreement in consideration

of the same rate of interest named in the note, for extension of time of payment, without payment of interest in advance, if made without the knowledge of the sureties, was held to discharge the sureties.

It is contended by the appellant's counsel, that defendant, having executed the note as a maker, stands as a principal debtor after indorsement, and the indorser as a surety. This might be true if the paper were negotiated in the ordinary course of business. If Stillwell had purchased the note of the payee, even with knowledge that Aaron had executed it for accommodation, he, under the cases cited by counsel, would have had the right to treat him as a principal, and Steers, the indorser, as his surety throughout.

The cases cited fully sustain that view. But here there was a borrowing of money. It was pre-arranged by Stillwell and Blair & Steers, who borrowed the money, that the latter should procure the name of some other person to the note as surety. It was in no sense the case of a note negotiated in the ordinary course of business, or rather of a note bought by Stillwell of the payee. It was of such a note that it was said, in the *Bank of Montgomery vs. Walker*, (9 Serg. & Rawle, 238,) that: "When the note was endorsed, it passed into the defendant's hands as a business note, it was drawn in that form, it assumed that shape to serve the purpose of Walker & George." Then Walker & George, the payees, were the principal debtors, and the maker had executed the note for their accommodation.

That case is distinguishable from this, in the fact there the note was executed by the maker, under circumstances which indicated that he intended to be held as the principal debtor. In *Saxton vs. Peat*, (2 Campbell, 185,) the doctrine was announced by Lord MANSFIELD, that: "If the indorsee of a bill of exchange, having notice that it was accepted without consideration, receive part payment from the drawer, and give time to pay the residue, he thereby discharges the acceptor." But this was afterward denied in *Kerrison vs. Cook*, (3 Campbell,) by GIBBS, J., and also in a case in 11 Vessey; also in *Fenton vs. Pocock*, (5 Taunt, 192.) We

think it will be found that the recent American cases do not hold the strict doctrine announced in the English cases, which repudiate that held by Lord MANSFIELD, in *Sutton vs. Peat*. Regard is paid to the substance of the transaction, and the agreement of the parties, express or implied. If one who is but surety execute a note as maker, or accept a bill intending to be held as a principal, and the security is so taken by the indorser, he may be treated in the character he was assumed on the face of the transaction, notwithstanding the holder, when he received the security, was aware that the maker, or acceptor, had become so far the accommodation of the drawer of the bill, or indorser of the note. This proposition the authorities fully sustain. *The German Savings Association vs. Helmrick et al.*, (57 Mo., 101,) was a case like the present. The note was executed by Helmrick & Co. and Jas. M. Ward, payable to Helmrick & Co., who assigned it to the German Savings Association. Ward executed the note for the accommodation of Helmrick & Co., and the Court decided that Ward was released, in consequence of a binding agreement for extension of the time of payment between the holder and Helmrick & Co. In the case at bar the Court erred in its instruction, not to the prejudice of plaintiff, however, but against the defendant.

The cases of *Hosea vs. Rouley*, (57 Mo., 357,) and the *German Savings Association vs. Helmrick*, (*Ib.*, 100,) seem to have been misunderstood by the Court below. The opinions in those cases do not really assert a doctrine different from that here announced.

The judgment is affirmed. All concurring.

Court of Appeals of New York.

JANUARY 21, 1879.

RICHARDSON vs. HUGHITT.

PARTNERSHIP—CONTRACT—COMPENSATION BY PORTION OF PROFITS. Where a contract provided for a loan of money, and gave a portion of the profits to the lender as a compensation, *held*, that the lender was not liable as a partner.

Defendant loaned money to the firm of Bench Bros. & Co., under an agreement for one fourth of the net profits on certain wagons to be manufactured, together with interest at five and one fourth per cent. on the amount loaned. Plaintiff brought an action, and sought to charge defendant as a partner with Bench Bros. & Co.

Rollin Tracy, for Appellant.

Hughitt had such an interest in the business and the profits as rendered him liable to the creditors of the firm. *Metcalf on Contracts*, 114; 3 N. Y. S. C. R., 742; 45 N. Y., 797; 48 *Ib.*, 545; 37 Conn., 250; 58 N. Y., 272.

H. V. Howland, for Respondent.

The contract did not constitute Hughitt a partner in any sense. The relation was that of lender and borrower simply, and the stipulation for profits was but a mode of compensating Hughitt for the use of his money. 25 Barb., 13; 3 Comst., 132; 20 Wend., 70; 47 Barb., 317; 12 Comst., 69; 58 N. Y., 257.

MILLER, J., in delivering the opinion of the Court, said:

The facts in this case are uncontradicted; and the question to be determined is, whether Hughitt had such an interest in the profits of the business of Bench Bros. & Co. as to render him liable jointly as a partner with the other defendants to third parties. Hughitt was to advance money upon the wagons manufactured upon the terms provided for in the contract, and with the single exception of the provision made therein, that Bench Bros. & Co. were to pay one fourth of the net profits upon the sales of wagons, with interest on the advances made at five and one quarter per cent., so far as the cash received would go, and the balance in notes on interest at seven per cent. There is no question, I think,

that the contract between the parties related to a loan of money alone upon the terms stated therein. Nor am I prepared to assent to the proposition, that this portion of the agreement, considering the facts connected with it, and the terms employed in the same, created a partnership between the contracting parties. The true construction of the instrument evidently is, that it was a contract between the lender and the borrower; and the provision made as to the profits was merely a mode of providing a compensation to Hughitt for the use of the money which he had advanced; and the share of the profits which Hughitt was entitled to receive was not as a partner, but on account of the debt owing to him by the firm of Bench Bros. & Co. The general rule no doubt is, that to constitute a partnership there must be a community of interests *inter sese*, and that the parties should share the profits and loss. (3 Kent, 23; *Pattison vs. Blanchard*, 1 Seld., 186.) This, however, is not without exception; and where there is an agreement for sharing in the profits of a business, in some cases it is sufficient to establish a partnership as to third persons. (See *Manhattan Brass M'fg Co. vs. Sears*, 45 N. Y., 797.) And here comes in another exception to the rule last stated, which is, that where the person has no interest in the capital or business, and is to be remunerated for his services by a compensation from the profits, or measured by the profits, or what is to depend, as in case of seamen or other voyagers, upon the result, it has no application. Where, then, one is only interested in the profits of a business as a means of compensation for services rendered, he is not a partner. (*Leggett vs. Hyde*, 58 N. Y., 272, 280; *Smith vs. Bodine*, MSS. of May, 1878; *Vanderburgh vs. Hull*, 20 Wend., 70; *Burckle vs. Eckhart*, 1 Denio, 337, on appeal, 3 Comst., 132; *Fitch vs. Hall*, 25 Barb., 13; *Lamb vs. Grover*, 47 *Ib.*, 317; Smith's L. C., 5th Am. ed., 292.) These cases fully sustain the doctrine laid down, that where the profits are a measure of compensation, no partnership is created. The amount of profits which was to be received by Hughitt was as a compensation for loaning the money, and not as the profits as a partner.

Judgment affirmed.

Recent Decisions.

FORMER ACQUITTAL.

When Plea of, not Good.—Where an acquittal is effected by reason of a variance between the allegations and the proof, it cannot, in Virginia, be pleaded as a bar to a conviction on another indictment for the same offense. The Court said: "In this case the prisoner, by her counsel, moved to exclude all the evidence on account of the variance between the proof and the charge in the indictment, as above indicated. The Court granted her motion, and excluded the Commonwealth's evidence, and discharged the jury. The evidence offered by the Commonwealth being excluded by the Court, the verdict would, of course, have been a verdict of not guilty. That verdict would only have discharged the prisoner from further prosecution under that indictment. The action of the Court in excluding the evidence and discharging the jury, accomplished precisely the same thing. If the jury had not been discharged and rendered a verdict of not guilty; that verdict could not have been pleaded to the second indictment, because the acquittal was affected in consequence of a variance between the allegations and the proof. Whatever may have been the rule at common law, or the principles settled by the cases relied on, our statute puts that question at rest forever. For it provides that "a person acquitted of an offense on the ground, of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the force or substance thereof, may be arraigned again on a new indictment, or other proper accusation, and tried and convicted for the same offense, notwithstanding such former acquittal. Code, 1860, Ch. 199, § 16, p. 814. *Ib.*

APPENDIX.

Unwritten Opinions Supreme Court of California.

JANUARY TERM, 1879.

DAMERON ET AL., Plaintiffs and Appts. }
vs. } No. 6133.
DAVIS ET AL., Defendants and Resp'ts. }
Appeal from Twentieth District Court, County of
Santa Clara.

The following findings will show the nature of the case.

1st. In the year 1846 a Mexican priest of the Mission of San Jose undertook to grant to one Galindo a tract of land near the town of Santa Clara, and embracing the premises in dispute.

Thereafter said claim was presented to the United States Board of Land Commissioners and rejected. An appeal was taken to the United States District Court when former decision affirmed (July 30, 1863). From this judgment notice of appeal to Supreme Court of United States was given, but not perfected, so case docketed and dismissed (December Term, 1868), and final judgment and decree rendered against Galindo upon 2d of February, 1870.

2. The grounds for rejection was that the priest had no authority under the Mexican laws to make any grant.

3. While Galindo's claim was in litigation he conveyed to Gould & Perley the undivided half of said grant. Thereafter these last parties for a recited consideration by A. R. Redman, attorney in fact, assigned this interest to one Lander.

4. On 28th of October, 1868, a conveyance was executed by Lander of this tract to J. R. Johnson. This deed was by arrangement dated May 1, 1862. It was not executed in pursuance of any former agreement, or in execution of any trust, but solely to enable Johnson to avail himself of certain Acts of Congress.

5. In 1852 one Bellamy was in possession of a tract of land including premises in dispute, claiming it as public land of the United States, and asserting a possessory right in himself.

Such interest as Bellamy had was sold under execution, and J. W. Redman became purchaser and took possession. In 1868 J. W. Redman died, and his son R. A. Redman (the same who acted as attorney in fact for Howard, Perley & Gould) was appointed executor, and retained possession until 1866, when one Maclay was substituted as administrator.

6. In July, 1865, Probate Court of Santa Clara ordered the sale of J. W. Redman's interest in tract, which sale took place and tract purchased by J. R. Johnson November 5, 1865.

7. Johnson did not at any time have possession in good faith, of any part of premises, but the same were held by Redman in his lifetime, by his estate after his death, and by Maclay to his own use and for his own benefit, and not for Johnson.

8. January 9, 1869, Johnson applied through Land office, to purchase as a pre-emptioner; respondent Davis, who also applied to purchase, resisted.

9. Davis entered on this tract in 1852 as tenant of Bellamy. In 1864, on expiration of lease, Da-

vis with his family moved on to the subdivision embracing premises in dispute and there resided until 1866, when he was forcibly removed by Redman. After removal Davis continued to assert his claim and made leases of the land.

10. Upon the contest, Johnson vs. Davis before said department, it was adjudged that Davis was entitled to purchase tract in question, and this was so determined by Register and Receiver, Commissioners of Land Office, and upon appeal by Secretary of the Interior.

11. In passing upon the facts of the case it was found by Secretary of Interior that Davis was a qualified pre-emptioner. * * *

12. For these and other reasons assigned (these other reasons are referred to in appellant's argument) the Secretary adjudged the land to Davis and directed that a patent issue to him, which was done May 1, 1874.

13. At date of purchase by Lander from Gould, Perley and Howard, and also of the purchase by Johnson from Lander the value of the land was over twenty times the consideration paid at either purchase. Neither Lander or Johnson were purchasers in good faith. * * * Simply a speculation.

14. On October 10, 1872, Johnson sold to appellant Dameron a portion of his interest in the land.
15 and 16. Nature of other plaintiffs' interest.

17. In 1876 an action was brought by these plaintiffs against Davis to recover portion of a tract contiguous to land here sued for. Judgment was given for Davis. Appeal taken but not perfected. Judgment enforced by sale and Davis purchased all the interests of plaintiffs. No redemption was made and Sheriff executed deed to Davis for the whole of the premises and the interests of plaintiffs therein, and Davis still holds the same.

18. Before bringing this action Dameron tendered to Davis a deed for his execution of the premises sued for, and also tendered him such money as he (Davis) had disbursed in securing the United States patent, and then demanded of Davis that he execute the deed. Davis refused.

CONCLUSION OF LAW.

That upon the foregoing facts, there is no equity in plaintiffs entitling them to have a trust declared as to the property in controversy as against said Davis.

Plaintiffs' bill dismissed and defendant takes judgment for his costs.

Judgment accordingly.

Plaintiffs gave notice of motion for new trial on the grounds:

1. Insufficiency of evidence.

A. And in this, the findings are contrary to the findings by the Secretary of the Interior which are conclusive.

2. Judgment is against law.

B. And in this, the Secretary of the Interior decided that the deed from Galindo to Lander, being absolute on its face, a trust in favor of Redman could not exist, or be shown by parol, and

therefore his estate never had any interest legal or equitable, in said land.

3. Error in law occurring at trial and excepted to by plaintiffs; and motion based on minutes of Court, bill of exceptions and statement of the case.

New trial denied.

Plaintiffs appeal.

J. P. Dameron, attorney for appellants.

The Secretary of Interior permitted Davis to enter as a pre-emptioner. We aver that he erred in matters of law in his decision.

This case seems to fall within the rule laid down in 47 Cal., 461, and Shipley vs. Cowen, Sup. Ct., United States, October Term, 1875. The Court says in 28 Cal., 339, "An error in matters of law by officers of the Land Department may be corrected and proper relief granted by the Courts."

The Secretary of Interior decided against Johnson on the grounds that he did not have the Mexican grant title at the time the grant was rejected, and says that the grant was finally rejected July 30, 1868, when the records show that the appeal to the United States Court in the case of the Gallardo grant, the Mexican grantee was not docketed and dismissed until December Term, 1868, which he says is *prima facie* evidence of that date.

So long as the appeal was pending the grant was not finally rejected. (20 Cal., 339-417; *Bonner's Dictionary*, 2 vol. 576; 1 *Bonner's Institutes*, note 731.)

The Secretary says that 'he deed to Lander being absolute on its face, a trust in favor of Redman could not exist or be shown by parol.

This is not good law. (See 27 Cal., 603; 29 Cal., 18; 24 Cal., 336; 30 Cal., 136; *Berry on Trust*, 1 vol. 261.)

Davis not being a party to the trust or holding under any other trust, had no right to question the trust.

As to the seventh finding, that Johnson did not at any time have possession in good faith, *in fact* fetched, when the deed by Macley to him shows it was recorded October 13, 1866, was notice to the world that he was the owner.

As to the eleventh finding, no one claims that Macley was agent of Lander, but the testimony of Macley shows that he was the agent of Johnson, and not Lander, and so long as Macley was ready to attom to Johnson it made no difference to Davis whether Macley said he owned it, or that Johnson owned; the record showed who was the owner.

B. F. Leib, attorney for respondent.

Plaintiff claims under seventh section of the Act of Congress of July 23, 1866, and defendant under pre-emption patent.

The specifications are entirely valueless for any purpose.

A specification should be clear, distinct and explicit—which these are not.

The specification is not that the evidence is insufficient to support the finding, but is that a certain designated and recited portion of it does not justify it.

Were all the findings excepted to, yet they are amply sufficient to sustain judgment and are fully sustained by the evidence.

The seventh section of the Act of Congress requires that before a person can be a valid claimant thereunder all these things must concur, viz:

1. *The purchase must have been made under a Mexican grant. That is, a grant that was real or had the semblance of being an official grant.*

The finding shows that this was neither a grant nor a semblance of a grant, but simply a priest's deed.

2. *The grant must have been finally rejected at the date of the act.*

The claim in this case was not finally rejected until after that date.

3. *The purchase must have been made prior to the date of the act.*

In this case the purchase was not made until after and solely to enable the purchaser to avail himself of the act.

4. *The purchaser must have been in possession of the land, improving and cultivating the same.*

The purchaser was never in possession. He himself fixes the commencement of his occupation on November 28, 1868.

5. *The purchase must have been in good faith.*

Contra findings.

6. *At the time plaintiff sought to enter the land there must have been no adverse right or title.*

There is no allegation even that there was then no adverse right or title.

Even if plaintiffs had any title, the Sheriff's deed conveys it to Davis.

Judgment affirmed.

UNION CONSOLIDATED MINING Co. of Cerro Gordo, Plaintiff and Appellant } No. 5669.
vs.
THOS. PASHMORE, Tax Collector of Inyo county, Defendant and Resp.

Appeal from Sixteenth District Court, Inyo county.

The suit was to recover back money paid under protest.

The first count sets out that plaintiff, a mining corporation, claims and is possessed of certain lands supposed to contain mineral, known as the Union, San Felipe, Santa Maria, Enterprise, and J. Nelson locations, the legal title to all of which property is in the United States, except the Santa Maria, for which a patent has been granted.

The Assessor furnished a form of statement and affidavit in accordance with section 9530 of the Political Code, which plaintiff filled up, swore to and returned to him as follows: Total value of real estate and improvements, \$6,840; value of personal property, \$6,436. The Assessor put the property in the assessment book as follows:

Total value.....	\$131,675
Personal property.....	6,436
Two houses and lots.....	500
Furnaces and improvements.....	12,000
Total accrued value.....	\$150,611

And the plaintiff avers that the said Assessor did not assess the said property equally and uniformly with the other property in said assessment book, nor according to the best of his judgment, information or belief, at its cash value. Nor did he examine said property at all, or form any judgment thereon, nor did he faithfully comply with all the duties imposed upon him by the revenue laws, but in disregard thereof, and without making any personal examination of said property, and through malice and ill-will placed said property in said assessment book at a valuation greatly above its true cash value, and at a valuation at least ten times its full cash value.

Plaintiff appealed to the Board of Equalization from the assessment on the mining claims and proved to them that the value was not more than \$6,840, and that the income was not equal to the expenditure.

The Board ordered the whole assessment to be reduced in the sum of \$80,000, that is, to the sum of \$70,611, they being then more productive and more one in sight.

The same mines were assessed the previous year at \$17,000, they being then more productive and more one in sight.

Plaintiff avers that said valuation and assessment is unfairly made and is unequal and oppressive. That the same has not been made with any attempt to carry the law into effect, but in total disregard of its mandate. That both the Assessors of the Board of Equalization decline to bring their judgment to bear upon the question submitted to them, respectively and arbitrarily, and with intent to defeat the equity at which the law arrives, determined to impose an excessive burden upon the plaintiff, and their action was an arbitrary and capricious exercise of official authority.

The Board did not appraise each of said mining claims, but assessed the eight distinct properties all together. The Assessor handed over the du-

uplicate assessment book to the defendant who threatened to sell them, adding five per cent., which sale would cast a cloud on the title and produce irremediable mischief.

That the assessment was wholly illegal, and the tax imposed on said mining claims void, but solely to prevent the said cloud and mischief, plaintiff paid the taxes demanded, at the same time delivering to the defendant a notice in writing that plaintiff paid the same under protest in order to prevent a sale of the property of plaintiff, specifying that said taxes were illegally and unjustly demanded for the reasons hereinbefore mentioned.

The second count is for money had and received in the ordinary form.

Defendant demurred, and assigns as causes:

1. Misjoinder of parties defendant.

2. Misjoinder of causes of action.

3. That the first count did not state facts sufficient.

4. That the second count did not state facts sufficient.

The demurrer was sustained and judgment entered for defendant, from which plaintiff appeals.

The transcript does not, after the notice of appeal, set out any other documents.

B. S. Brooks, attorney for appellant.

The question presented is whether the Court erred in sustaining the demurrer and giving judgment for defendant.

The ground that there is a misjoinder of parties defendant when there is but one party defendant, is meaningless, and the ground that there is a misjoinder of counts when both are counts for money had and received, needs no argument. There remains then only to consider whether either of the two counts state facts sufficient, etc.

The second count being in the ordinary form of a count for money had and received, I suppose to be substantially good. Certainly upon a general demurrer.

It was intended to set forth in the first count the facts upon which the plaintiff intends to rely, but as it is quite possible to omit something or make mistakes, and to avoid questions at variance, the common count is added.

It seems to be well settled that illegal taxes, the payment of which is exacted by legal coercion, may be recovered back in an action for money had and received. (3 Cal., 141; 16 Cal., 167; 22 Cal., 111; 46 Cal., 586; 49 Cal., 637; *Cooley on Taxation*, 568, 669.)

An assessment is absolutely essential to the validity of the tax. The complaint alleges that there was no assessment. (49 Cal., 290; 47 Cal., 261; 49 Cal., 663; 39 Cal., 449; 8 Cal., 123; 25 Cal., 107; 10 Cal., 589; *Cooley on Taxation*, 559; *Blackwell on Tax Titles*, 114 to 117.)

In the absence of qualifying language the value with a few, simple rules will be understood. (3 Nev., 241.)

When the fee is in the United States the interest or claim of the occupant must be assessed *conjointly*. If the assessment is general it is wholly void. (23 Cal., 73; 18 Cal., 631; 30 Cal., 646; 31 Cal., 147.)

When the occupant appealed to Board of Equalization, they were bound to value each parcel of property. The want of an equalization is just as fatal as the want of an assessment. (49 Cal., 627; 28 N. Y., 283.)

Assessing five separate and distinct parcels of real estate, in one of which the plaintiff had the fee and the other belonging to the Federal Government, and three of personal property together, was illegal. (8 Cal., 151, and numerous authorities cited at p. 151; 36 Me., 318; 9 Ohio, 43; 43 Cal., 128; 48 Cal., 437.)

It was an *invidious assessment*. Public officers, "instead of attempting to carry the law into effect, have wholly disregarded its mandate, occasioned to bring their judgment to bear upon the questions submitted to them, and arbitrarily, with the intent and purpose to defeat the equity at

which the law aims, have determined to impose an excessive burden upon particular citizens. (*Cooley on Taxation*, 187; 24 Mich., 170.)

Under the statutes of California a tax deed is *prima facie* evidence of the regularity of all proceedings resulting in the deed, and is, therefore, *prima facie* evidence of title in the grantor. Such a deed, in pursuance of a void sale, casts a cloud upon the title. (47 Cal., 147; 9 Sawyer, 608.)

The claim that the appeal should be dismissed because the notice of justification of sureties was insufficient or not before the proper magistrate, is untenable. If the notice was insufficient, it should have been declined or returned with objection. Due service was admitted, and the notice was retained without objection.

Section 918 does not require the justification to take place before a County Clerk of Inyo county. The statute says a County Clerk. If it meant the Clerk of the county where the judgment was entered, it would say so, or use some equivalent words.

The effect of the failure of the sureties to justify upon a notice is that "execution of the judgment over a decree appealed from is no longer stayed." The law has been changed since the decisions were made, which are cited by respondent. (*La Coste vs. Solivale*, Mass. Jan. T., 1877; 7 Cal., 244; 15 Cal., 374.)

Reddy & Conklin, attorneys for respondent. Appellant has no standing; he neglected to enter an undertaking on its appeal as required by sections 940 and 941 C. P.

In support of this, respondent shows that on November 23, 1877, appellant filed in the office of the Clerk of the District Court of the Sixteenth Judicial District, an undertaking on appeal with sureties.

On November 28th, respondent filed notice of exception to sufficiency of sureties.

On December 10th, appellant served notice that sureties would justify.

On December 18th, sureties appeared before County Clerk of San Francisco and justified.

The appeal should be dismissed for the following reasons:

The notice of the time of justification of sureties was insufficient. Respondent was entitled to five days' notice (see section 948, C. P., Pro.) and one day additional for every 25 miles of distance between the place of deposit of notice, (see section 1013, C. P.) which was San Francisco, and the place of address Independence.

From San Francisco to Independence the distance is at least 590 miles, which would entitle the respondent to 26 days' notice of the time of said justification. Whereas, the notice of the justification or sureties was dated on the 6th of December, received by respondent on the 10th of December, the pretended justification had on the 18th of December. There was therefore no justification of said sureties.

The justification must be before a Judge of the Court below, a County Judge or County Clerk. (Sec. 948 C. P.) If the justification is before the Court below, which in this case is the District Court, it could have been made before the Judge at any place in the district. If made before the County Judge or County Clerk it must be before the County Judge or County Clerk of the county in which the suit is to wit, Inyo county.

The cases of *Roush vs. Van Haven*, 18 Cal., 668, and *Tevis vs. O'Connell*, 31 Cal., 512, are conclusive on this point.

The appeal is therefore ineffectual for any purpose whatever, appellant having failed to perfect its appeal within the time prescribed by secs. 940 and 948, C. P.

The action does not lie against the Tax Collector, because it was his duty to receive from plaintiff the amount found charged in the duplicate assessment book against appellant's property, and a refusal on his part to receive it would have been a crime for which he might have been removed from office and otherwise punished; and when received, if he did not pay it over to the County Treasurer on

the first Monday of the next succeeding month or within five days thereafter, he would be liable for the full amount of taxes charged upon the assessment roll. (*P. C.*, secs. 3753-4 and sec 434, subs. 9 and 10; *P. C.* and sec. 944.)

The statutes of this State prescribe the course of proceedings for the recovery of taxes erroneously or illegally collected. (Sec. 3804 *P. C.*) "Any taxes, per centum and costs erroneously or illegally collected, may by the order of the Board of Supervisors be refunded by the County Treasurer."

The county, if any one, is the party responsible in this case. (See Wells, Fargo & Co. vs. Dayton 11 *Nw.*, 161, and 4075 *P. C.*)

The payment by plaintiff to defendant was voluntary, because it is not alleged that tax was delinquent at the time, hence cannot be recovered back from any one. (Bank of Santa Rosa No. 5171, April term, 1877, Supreme Court of California.)

The facts stated in the complaint, as contradistinguished from the conclusions of law drawn by the plaintiff, namely: "that the said assessment was wholly illegal, and the tax imposed upon said real estate was illegal and the whole of said tax void," shows that there was an overvaluation by the Assessor and the Board of Equalization. The Board in passing upon this question acted in a judicial capacity, and its decision was an adjudication as to the value thereof. (44 *Cal.*, 523; 45 *Cal.*, 668.)

Judgment affirmed.

CURRY, Plaintiff and Respondent }
vs. } No. 5693.
ALVARADO, et al., Defts and Appltis. }

Appeal from Fifteenth District Court, San Francisco.

On motion of J. R. Castro, filed September 27, 1876, to set aside writ of possession, dated September 21, 1876, herein, and have the same returned unexecuted as to said J. R. Castro and A. M. Castro, and to set aside the judgment (which was entered November 30, 1876,) as to A. M. Castro, certain affidavits, etc., were read, and an order was made thereon, that plaintiff show cause why said writ should not be returned unexecuted, etc., as above, and the same coming on to be heard, the court denied the motion, whereupon defendant, J. R. Castro, appeals.

E. A. Lawrence, attorney for appellants.

The motion was denied on March 2, 1877, and petitioner appealed.

We contend the motion should prevail, because the judgment against A. M. Castro was set aside December 24, 1876, and it does not appear that he was a party to the appeal.

A. M. Castro was only servant for J. R. Castro, his son, and J. R. Castro cannot be turned out under the writ against him. (Partridge vs. Roe; Hawkins vs. Relebert, 28 *Cal.*, 535.)

A. M. Castro was never served with summons herein, and hence there can be no judgment against him.

Mrs. F., his daughter, is defending for the same premises, and, therefore, the writ cannot be executed so as to turn her out, or A. M. Castro, an inmate of her family.

L. Reynolds, attorney for respondent.

No ground of the motion was stated in the order to show cause. The allegation in the affidavits referred to, which seemed more particularly relied upon, was that A. M. Castro was not in the occupation of the possession when the suit was commenced, but the respondent showed by affidavit very clearly that he was.

So far as the facts were concerned, the allegations of the affidavits of the appellants were denied and disproved by the affidavits produced by respondent.

No ground being stated in the notice of motion, that of itself was a sufficient reason for denying it.

(District Court Rules, R., 4; 6 *How. Pr.*, 296; 15 *Abb. Pr.*, 48; 26 *Barr.*, 412.)

The notice must state all the objects of the party's application, for he cannot extend his motion to any object not specified. (7 *Cal.*, 153.)

Therefore, the appellants could only ask to set aside the writ; but the writ was regular, and was a matter of right while the judgment stood. (Sec. 681, *C. C. P.*)

To have granted the motion would have left the plaintiff perfectly remediless, while there is no denial of plaintiff's title, and the judgment is conclusive evidence of it.

There must be an affidavit of merits; there is none. (28 *Cal.*, 197; 29 *Cal.*, 433.)

When the affidavit does not state what ought to be alleged in favor of a motion, the presumption is that it could not be asserted. (3 *Cal.*, 105.)

More than five years having elapsed after the entry of judgment, the court has no jurisdiction to grant the motion. (3 *Cal.*, 238; 4 *Cal.*, 360; 5 *Cal.*, 406; 8 *Cal.*, 531; 19 *Cal.*, 708; 30 *Cal.*, 638; 25 *Cal.*, 51; 25 *Cal.*, 169; 26 *Cal.*, 337; 30 *Cal.*, 197.)

(Freeman on Judgments, 2d ed., sec. 38 and sec. 96; sec. 473, *C. C. P.*)
Judgment affirmed.

Low, Plaintiff and Respondent }
vs. } No. 5670.
MAHE, et al., Defts and Appltis. }

Appeal from County Court of City and County of San Francisco.

Plaintiff's assignor devised to defendant Mahé's assignor, certain premises for, etc. The term has expired, and plaintiff claims possession.

Defendants, in their answer, set up that by the lease referred to, defendant's assignor covenanted and agreed that he would erect, etc., on the premises, a three-story brick building, in accordance with specifications, etc., and plaintiff's lessor covenanted and agreed to and with the said lease his executors, administrators, and assigns, that in case of the full and punctual payment of the rent at the times, and in the manner specified in the said lease, and of the faithful performance of all the covenants and agreements in said lease contained on the part and behalf of the party of the second part, his executors, administrators, and assigns to be kept and performed, he would, at the expiration of said term, purchase the building then standing upon the said premises, at their appraised value, to be determined, etc., and, also, that it was further covenanted that lessee should remain in possession of premises until lessor should pay for building, and that the building should remain the property of lessee, etc., until paid for. Defendant also set up a counter claim for price of building.

Judgment for plaintiff.

Defendants moved for a new trial, which was denied, and now appeal.

T. J. Gallagher, attorney for appellants.

The covenants to purchase and deliver possession are dependent. (Dunlap vs. Mann, 4 *Sett.*, 508; 16 *John.*, 367; 8 *Deno.*, 363; 1 *Kern.*, 453; 19 *Ohio*, 247.)

The counter claim for price of the building should have been allowed. (31 *Cal.*, 236; 14 *Ala.*, 201; 5 *Ind.*, 146; 31 *Pt.*, 81.)

As to valuable improvements, (9 *Ca.*, 440-444; 25 *Me.*, 350.)

Tenant, under agreement to sell his building to lessor, may retain possession until paid. (3 *Duer.*, 425-16; *Abb.*, 310; 26 *How.*, 599; 17 *N. J. Eq.*, 61; *Seaton*, 10; 1 *Green. Ch.*, 369.)

This covenant runs with the land. (3 *H.*, etc., 798; 3 *Salkeld*, 4; 3 *Wils.*, 25; 6 *Ver.*, 279; 9 *Ohio*, 5. S., 340; 5 *Harring.*, 238; 3 *Curtis*, *C. C.*, 592; 24 *Ma.*, 121; 1 *Pa.*, 1 *J. Rep.*, 432; 21 *N. J.*, *Eq.*, 188.)

McAllisters & Bergin, counsel for respondent.

Recovery is resisted, upon the ground that the covenant in the lease to purchase the building confers the right of possession, and that the plaintiff cannot recover until he pays the appraised value of the building.

The covenant to purchase is an independent one. (84 No., 102; 2 Edw., CA., 389; 1 Woods, R., (U. S.) Civ., 227; 8 Wend., 620; 9 La., 184; 41 Cal., 13; 10 Johns, 208; 81 Cal., 226.)

Complete performance on the part of the lessee, of all the covenants on his part to be performed, constitute a condition precedent to any obligation to purchase; and among the not least important of these was the one to surrender possession at expiration of lease. (28 Cal., 289.)

Courts can construe, but cannot make contracts for parties, nor supply terms that they did not see fit to make. (19 Cal., 364; 43 Cal., 362; 43 Cal., 160.)

The rules for the construction of contracts are alike in all courts.

The covenant to purchase did not bind the plaintiff. It was not a covenant that ran with the land. (4 Const., 136; 4 Seld., 404; 8 Cow., 269; 23 Wend., 610; 11 Q. B., 444; 2 Platts on Covenants, 226-405; 2 Wall., 498; 81 Ill., 521; Civil Code, 1484.) Judgment affirmed.

CULP, Appellant }
vs. } No. 6809.
ZOOK, Respondent.

Appeal from Twentieth District Court, County of Santa Clara.

The action was to recover \$3,500, money alleged to have been advanced and loaned by plaintiff to defendant upon his promise to repay within a reasonable time. The complaint contained the averments which are usual and necessary in such an action. The answer contained denials of the averments of complaint and a defective plea of the statute of limitations.

The Judge filed written findings and rendered judgment thereon in favor of defendant. The plaintiff appeals, contending that upon the facts found judgment should have been in his favor. 1 is not disputed that the plaintiff advanced the money, but the defense put forward by the defendant and sustained by the Court below is that the payment was "voluntary."

The facts shown by the findings are substantially as follows: Plaintiff, defendant, and one W. L. H. were stock-holders in the C. T. Company. Zook and H. were to the banking house of McL. & R. their joint note for \$3,400, secured by a pledge of certain shares of said C. T. Co., in which shares no pledged plaintiff had no interest. H. then died, leaving defendant sole surviving obligor in said note. Subsequently and while the note was held by McL. & R. as aforesaid, an interview occurred between plaintiff and defendant of which the following account is given in the findings: "Upon the 29d of July plaintiff proposed to defendant that he (plaintiff) should pay the note of Z. and H., assigning as a reason therefor, that he wished to assist the estate of H. (H. being then deceased), and also to improve the credit of the 'C. T. Co. stock,' of which certain shares were then security for the note. Defendant informed plaintiff that he needed no assistance, and did not request any. That if plaintiff saw fit to pay this note he (defendant) would repay his part of the same to him in a few days. That he needed no assistance, as he could get what credit and money he required. Plaintiff said he would pay the note and would wait on the estate of H. for its part of the same." That was all that passed between the parties. Plaintiff then paid the note which was cancelled. Shortly afterwards defendant repaid to plaintiff \$3,500 of the amount the latter had paid for him, but the other \$1,400 was never repaid; and it is to recover that sum that the action is brought.

From the foregoing facts, the Court drew as its conclusion of law, that the payment was "voluntary" on the part of plaintiff as to one-half of the \$3,500 paid by him, and that he could not recover.

Judgment for defendant.
Plaintiff appeals.
Fringie & Hayne, attorneys for appellant.

The doctrine of voluntary payment has no application. This doctrine is applied where a payment is made without compulsion, in satisfaction of some claim asserted against the party paying, either with or without legal grounds. (See Chitty on Com., 11th, Am. Ed., p. 336.)

The doctrine has frequently been applied by this Court in relation to money paid under protest for taxes illegally assessed. (18 Cal., 271; Austin Cases, July T., 1873.)

There is no pretense of any demand in the present case.

It is true that one party cannot impose a liability upon another by rendering a service to him or making a payment for him not asked or desired. But in such case the doctrine of voluntary payment is not the one to be invoked. The matter is fully within the rule as to payments made or services rendered without liability or previous request, and is treated of by text writers under the head of "Consideration." (Parsons on Com., vol. 1, p. 471.)

There is no room for the operation of the rule, as to past or executed consideration or payment without request.

The plaintiff parted with his money only upon the defendant's express promise to repay it. The payment was the result of a proposal made by plaintiff to defendant, who acceded to it and promised that if the payment should be made as proposed he would "repay his part of the same within a few days." Now "his part" was the whole. The note was a joint note. Each party was liable for the whole amount, not for any specific portion of it.

This is a case in which the law implies a promise. The payment was made with defendant's knowledge and acquiescence, and he retained the benefit of it. (Parsons states the rule as to implied requests; vol. 1, p. 469.)

The circumstances exclude the idea of a gift.

The question of statute of limitations does not arise.

W. M. Hoover and C. C. Stephens for respondent.

The Court finds that payment on plaintiff's part was without request, duty or obligation, and was a voluntary payment, and that therefore he has no cause of action against respondent.

In support of this view we cite the following authorities: Kent's Com., 12 Ed., 3d v. l., pp. 616-17; Daniel on Neg. Inst., 2d vol., pp. 258-9; Parsons on Com., (5 Ed.) 1 v. l., pp. 471-4, 2d Barb., 151, and cases there cited.

Judgment affirmed.

MATTHEWS, Respondent }
vs. } No. 6845.
MARTIN, Appellant.

Appeal from Twentieth District Court, Santa Clara County.

This is an action to recover the amount of two promissory notes. The first is as follows:

"SAN JOSE, January 17, 1878.
"Six months after date, without grace, for value received I promise to pay to W. A. Matthews, or order at the office of, in, etc., the sum of \$3,000, in, etc., with interest, etc., and I further agree that if an action be commenced for the recovery of any amount due hereon against me, then I promise to pay as counsel fees an additional sum of ten per centum, in said gold coin, upon the amount due at date of payment or of judgment, to be included therein, the same to become due on filing a complaint in said action. If the interest is not punctually paid when due, then the whole sum or principal and interest shall immediately become due and payable."

The second note is similar in amount and condition, of different date.

Defendant denies each and every allegation.

The Court found that all the facts set forth and alleged in complaint are true.

That there is now due from defendant to plaintiff upon the notes, for principal and interest, \$—, and as counsel fees \$400.

Judgment accordingly.

Defendant moved for new trial on statement, and principally relying on the 2d and 3d errors of the Court, viz: 2d. The evidence is insufficient to sustain the finding that there was due to plaintiff for counsel fees the sum of \$400, because no evidence was given as to his having paid or incurred any amount whatever as counsel fees, or that the counsel fees were of any value.

The clause annexed to the contract providing for counsel fees, could only be sustained, if at all, as a penalty, and the burden of proof was upon the plaintiff to show what damages, if any, he had sustained in that behalf. 3d. The decision is against the law in so far as it decides that the plaintiff is entitled to recover counsel fees, because the clauses in the contract relating to counsel fees were and are void under the provisions of the Code of this State.

Motion denied, and defendant appeals.

Houghton and Reynolds for appellant.

The agreements annexed to the notes are void, as they determine the damage to be paid for a breach of the obligation in anticipation thereof. (Civil Code, Sec. 1,370.)

The judgment for counsel fee is unauthorized. The measure of damage caused by the failure to pay the notes when due was the amount of the principal and interest of the notes. (Civil Code, 883.)

The stipulation to pay 10 per cent. additional to become due on filing complaint is a penalty—the measure of damage for a failure to pay the note being fixed by the Code.

The parties to contract can only fix a sum as liquidated damages for the breach of a contract when from the nature of the case, it would be impracticable to fix the actual damage. (Civil Code, 161.)

In the absence of any of these provisions of the Code the stipulation to pay the additional ten per cent. would be regarded as a penalty and not as stipulated damages. That sum is not shown upon the face of the instrument to have been intended either as liquidated damages or a penalty, and the rule in such cases is, to treat it as a penalty. (Bayley vs. Fiddle, 5 Sand. R., 193.)

No damage was alleged or proved and none should be awarded.

The stipulation to pay 10 per cent. was annexed to these contracts merely to secure the payment of principal and interest, and is only an accessory to the principal contract, intended to secure the due performance thereof, or the damage really incurred by the non-performance; and actual damage can only be recovered. (Story's Eq. Juris. 2d ed., 1814-1816.)

Even though the ten per cent. had been declared in the contracts to have been intended as liquidated damages, it can only be treated as a penalty, because it is in its nature a penalty. (Jaquith vs. Hudson, 1 Cooley, 186; Morris vs. McCoy, 7 Nev., 408-401.)

It is settled law that no damages can ever be so liquidated between the parties for the mere non-payment of money, as to secure the payment of a greater sum than that named in the covenant and interest. (3 Parsons on Contracts, 150; 18 Barb., 55, and cases cited.)

D. M. Delmas for respondent.

The appeal from that part of judgment on the notes can have no other result than vexation and delay, and should be dismissed with costs.

As to the counsel fee.

The defect of appellant's argument is in assuming that the ten per cent. is to be paid as a penalty or as damages for the non-payment of the note. Had the note read, "I promise to pay at a given time, and in case I fail to pay at that time, I will forfeit ten per cent. as a penalty or liquidated damages for not paying," the argument that such a contract is contrary to the provision of the Code, which declares that the damage for non-payment of money is the sum due, with interest, might be plausible.

But the case supposed has no analogy to the

one in hand, in which the contract is, "I will pay on such a day, and if I do not, and you are compelled to sue me, I will reimburse you such sums as you are compelled to expend for counsel in the action."

A stipulation for counsel fee in promissory notes is common, I had almost said universal, in this State.

The Legislature has recognized the validity of such clauses in contracts for the payment of money by regulating them. (Stat. 1873-4 p. 707.)

The law evidently assumes that, but for the restrictive feature of the statute, parties might recover such counsel fee as they chose to agree upon. (44 Cal., 123.)

Judgment affirmed.

DAY, Respondent }
vs. } No. 6267.
PRINBLE, Appellant, }

Appeal from Twentieth District Court, Santa Clara County.

Action brought to recover the price of goods sold to defendant by Bell, Gullixson & Co., who assumed the debt to plaintiff.

Defendant demurred, for that complaint does no state facts sufficient, etc. (2) That it does not appear that plaintiff's assignors had any right to make said assignment, or had any right to commence or maintain said action.

Demurrer overruled and defendant answered, *inter alia*. That said firm name did not show the names of the persons interested as partners in the business, and

That said firm nor the members thereof, nor any one of them, never filed with the Clerk of the county in which the principal place of business of said firm is and was situate, a certificate stating the names in full of all or any of the members of said firm and partnership, or their places of residence, and that no certificate of such fact was ever published in any newspaper whatever.

The Court found that "John Bell" and "H. H. Gullixson" were partners under the name of "Bell, Gullixson & Co.," and that they did not until after the commencement of this action file with the County Clerk of San Francisco or with the Secretary of State at Sacramento, the statement referred to in defendant's answer; and

Also the indebtedness by defendant to Bell, Gullixson & Co., and the assignment by them to plaintiff, and gave judgment for plaintiff.

Defendant moved for new trial which was denied and now appeals.

Frs. E. Spencer of counsel, for appellant.

The firm with whom the alleged indebtedness was contracted transacted its business under a fictitious name. The name of the copartnership is "Bell, Gullixson & Co.," thereby conveying the impression that the partnership consisted of three or more persons. But leaving out the abbreviation, and assuming it to be surplage, the designation of the two partners, by what was shown by the evidence to be their surname merely, does not "show the names of persons interested as partners."

The law supposes every one to possess and be designated by two names—the one enjoyed by him in common with the other members of his family, the other his exclusive property and given him at baptism. (Frank vs. Levie, 5 Robt. N. Y., 599.)

It is repugnant to the rules of the Christian religion that there should be a Christian without a name of baptism. (4 Bacon Abr., 752.)

The fact that Courts uniformly treat with indifference the insertion or omission of a middle name is evidence of the importance of one Christian name. (17 Ala., 179; 17 N. H., 235; 25 Ill., 251; 3 Cal., 235; 6 Cal., 415; 20 Cal., 42.)

In England an initial letter has been rejected as an insufficient designation of a baptismal or Christian name. (M. G. & S., 177.)

A name is a word by which a person is to be

known or designated, and to be of any value should indicate the sex of the owner. (*Albany Law Jour.*, Aug. 17, 1878, 126.)

The name "Jo" has been held not to sufficiently or properly designate the sex of the owner. (*4 Cranck Ch.*, 457.)

Where there are two persons with the same name, the presumption is that the elder is referred to, unless some approximate suffix is used to indicate the contrary. (*4 Har.*, (Del.) 130; *3 Blackf.*, 39.)

Sections 2466 and 2468 of the *Civ. Code*, cut off the remedy upon contracts made by copartnerships in their favor as effectually as the bar of the statute of limitations.

The sections of the Code under consideration are remedial in their nature, and as such, should be so construed as to effectuate the intention of the Legislature. (*3 How.*, 197.)

It is a statutory provision, which acts upon the transaction by cutting off the remedy upon the contract. It is therefore not subject to the rules of strict construction given to penal statutes. (*1 Kent Com.*, 466; *1 Burrow*, 274.)

Although assignees are not named in the statute as falling within its inhibitory provisions, it will be construed as including them.

The sections under consideration were enacted in view of the existing rights and liabilities of assignees, as defined by section 388, *C. C. P.* (*5 Penn. St.*, 182; *Swoyer's Appeal*, *ib.*, 377; *13 Penn. St.*, 25.)

The rule is applied as to assignee of mortgage. (*22 Pitts. L. J.*, 182.)

And as to bonds. (*1 Dull.*, 23; *2 Yates*, 23; *20 Penn. St.*, 190; *43 ib.*, 70.)

And as to the assignment of a bankrupt or insolvent debtor. (*9 Ves.*, 100; *3 ib.*, 506.)

The construction contended for by appellant has been applied by Chancellor Walworth in interpreting the laws against usury. (*Smith's Com.*, p. 432; *ib.*, sec. 727.)

Robinson, Olney & Byrne, of counsel for respondent.

Bell, Gullixson & Co were not the plaintiffs, and the provisions of the statute (Sec. 2466, *C. C.*) referred to by appellant is intended to apply only to the plaintiffs in actions brought by a partnership.

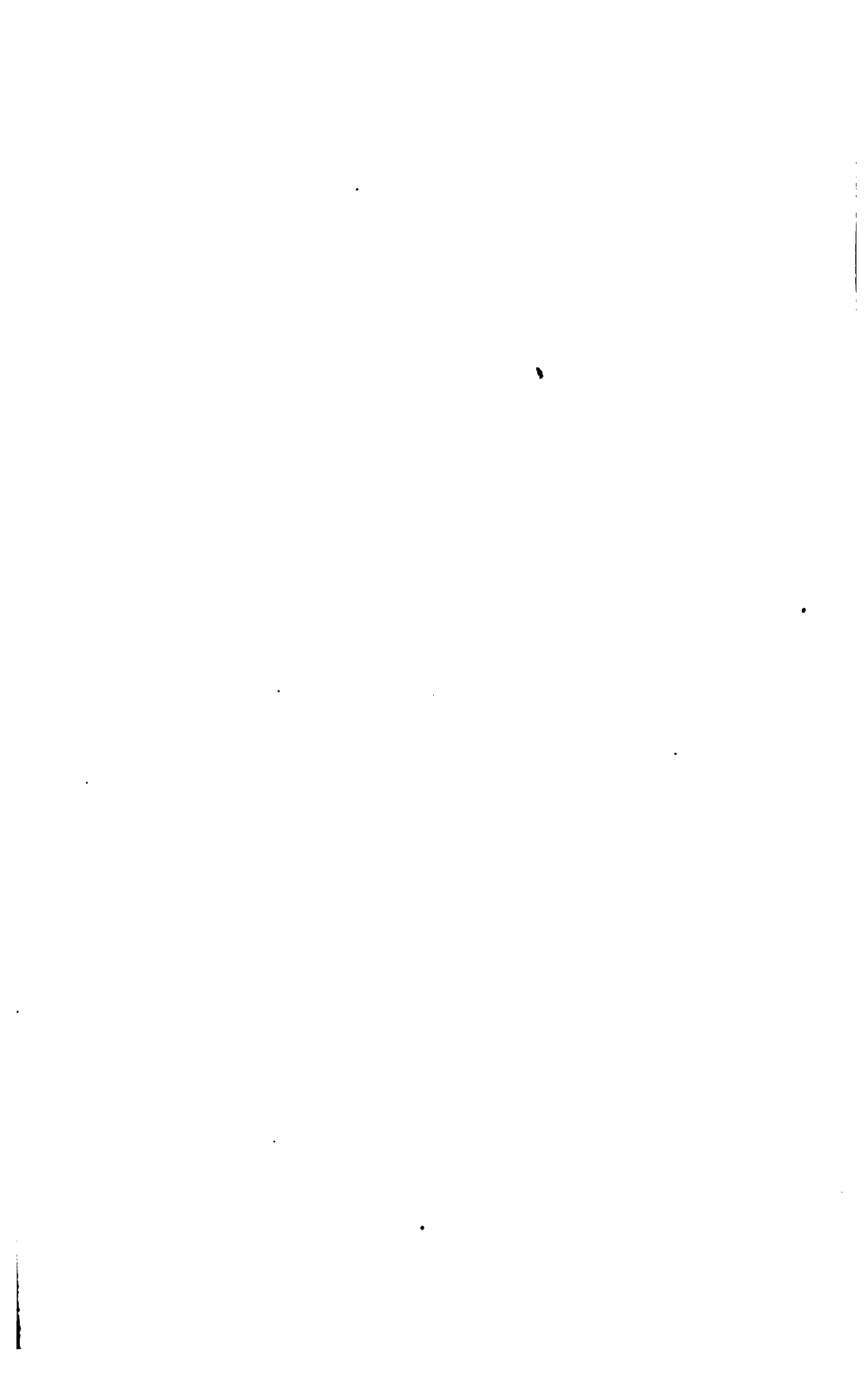
The firm name or designation under which Bell, Gullixson & Co. did business, *did* and *does* show the "names of the persons interested as partners in such business," and therefore the provisions of section 2466 are not applicable to the assignors of the plaintiff.

If we admit that B. and G. (for argument) came within the provisions of section 2466, still the defense in this behalf is not well founded. Section 2468 of *C. C.*, provides the penalty for not complying with its provisions; that is, "*they* (the partnership) shall not maintain any action, etc.," not the assignee.

There is nothing here to prevent them selling and assigning to plaintiff.

"The rule of law in the construction of remedial statutes requires great liberality, and whenever the meaning is doubtful, it must be so construed as to extend the remedy." (*6 Cal. R. p.* 470.) So statutes which tend to deprive citizens of acknowledged rights and privileges should be construed with the utmost strictness. (*6 Cal.*, 462; *22 Cal.*, 96; *ib.*, 125.)

Judgment affirmed.



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